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ORDER OF SUCCESSION AMONG ENUMARATED BANDHUS.

The recent decision* of a Division Bench of the Madras High Court on a rather vexed question of Hindu Law is important, and requires more than a passing notice. The Division Bench held that according to the Hindu Law, among Bandhus a mother's sister's son is entitled to succeed in preference to a mother's brother's son. It is somewhat startling at first sight to be told that a mother's brother's son should be postponed to a mother's sister's son, but a decision cannot be regarded as unsound merely because the result seems to be startling. Before we proceed to examine the grounds of the decision, it will be necessary to examine the texts of the Hindu Law bearing upon the point.

The leading authority in provinces governed by the Mitakshara School of Law is the *Mitakshara.* In commenting upon the text of Yajnavalkya, Ch. II, § 135-136, the author of the Mitakshara states in Chapter I, Section 6, Placitum 1: "On failure of gotrajas, bandhus are heirs. Bandhus are of three kinds: related to the person himself, to his father, or to his mother, as is declared by the following text: 'The sons of his own father's sister, the sons of his own mother's sister, and the sons of his own maternal uncle must be considered as his own bandhus. The sons of his father's paternal aunt, the sons of his father's maternal aunt, and the sons of his father's maternal uncle must be deemed his father's bandhus. The sons of his mother's paternal aunt, the sons of his mother's maternal aunt, and the sons of his mother's maternal uncle, must be reckoned his mother's bandhus.'" And again in Placitum 2 the author says: "Here by reason of near

* S. A 1060 of 1907 reported in 20 M. L. J., page 275.

affinity, the cognate kindred of the deceased himself are his successors in the first instance: on failure of them, his father's cognate kindred, or if there be none, his mother's cognate kindred. This must be understood to be the order of succession here intended." It must now be taken as settled that upon the construction of these passages in the Mitakshara the enumeration of Bandhus in the text cited by the author of the Mitakshara is merely illustrative and not exhaustive. The remarks of the Judicial Committee upon the construction of these passages in the Mitakshara in the case of *Gridhari Lal Roy* v. *The Bengal Government*[1], not apparently cited before their Lordships of the Division Bench, have a material bearing upon the determination of the present question and are well worth reproduction. Dealing with the text (the authorship of which has been variously ascribed) cited by the author of the Mitakshara in Ch. II., S. 6, Placitum (1), their Lordships observe:—"For the text does not purport to be an exhaustive enumeration of all *Bandhus* who are capable of inheriting, nor is it cited as such, or for that purpose, by the author of the Mitakshara—it is used simply as a proof or illustration of his proposition, that there are three kinds or classes of *Bandhus*; and *all that he states further upon it is* (the italics are ours) the order in which the three classes take, *viz.*, that the *Bandhus* of the deceased himself must be exhausted before any of his father's *Bandhus* can take, and so on." We think that notwithstanding the question before the Privy Council in the above case was not one of preference but only whether a person not named in the list was a *Bandhu* at all, the dictum above quoted must be taken as a weighty pronouncement of their Lordships of the Judicial Committee that the author of the Mitakshara in citing the text, which is ascribed by some to Vriddha Satatapa, by others to Vriddha Manu and by others still to Baudhayana, does not intend the enumeration in the text to be either exhaustive of the persons mentioned or to indicate the order in which the several persons named take, though he sufficiently makes it clear that the classes of Bandhus enumerated by him take in the order mentioned by him. And although ordinarily one need not go behind the pronouncement

1. (1868) 12 M. I. A. 465.

of the Judicial Committee, yet in view of the fact that the question raised before the Division Bench was not before the Judicial Committee and in view of the decision of the Division Bench in the case under discussion, we may state that the pronouncement of the Judicial Committee is amply supported by the Mitakshara itself as will be shown presently.

The learned Judges of the Division Bench, in the case under notice, observe that there is no indication as to the order of succession *inter se* of Bandhus comprised in each class (that is, as to their respective priority) unless the order in which they are placed is such an indication. Our reading of the Mitakshara, however, inclines to the view that the order in which they occur is not any indication of the order in which the persons enumerated are entitled to take. While the author of the Mitakshara expressly states that the order in which the classes are enumerated is the order in which each class takes, the absence of any express mention by him that the order in which the persons are named in the class is the order in which such member will take, is a sufficient indication that that is not the intention of the author of the Mitakshara. Again when once it is admitted that the persons named in the class are not exhaustive of the class so that besides the persons expressly mentioned in the text we have to include other persons not named in the text as comprised within each class it will be difficult to accept the view that the persons therein named should have the preference and that the order mentioned in the text is indicative of the order of preference.

Again the text of Vriddha Manu, Vriddha Satatapa or Baudhayana is cited by the author of the Mitakshara only for the purpose of showing that there are only three classes of Bandhus as mentioned by him previously. The context in which this text occurs in the work of the original author does not appear; but it is believed that it is cited by him to denote the class of relatives who have to observe pollution, and hence it is difficult even to theorize that the object which the author has had in enumerating the persons mentioned is to indicate the nearness of relationship for the purpose of inheritance. Of course the author of the Mitakshara in citing the text intends it as a rule of inheritance ; but he cannot have intended the order in which they are named to be the order in

which they are intended to take especially when he takes care to say that the order in which the classes are named is the order in which each class is entitled to take , and if we remember that there are very many other relations in each class of Bandhus some of whom are undoubtedly more nearly related than those expressly named, it is difficult to accept the theory that the order in which the persons are named in each class is the order in which they are entitled to take. If that was the intention there would have been no difficulty in expressing it, especially when we find that Yajnavalkya himself, in Chapter II § 136 and 137 in declaring the persons who are obstructed heirs upon which the whole Mitakshara Law of Inheritance is based, expressly states that the order in which he names the persons is the order in which they are entitled to take (See Mitakshara Chapter II, S. 1, Placitum 2). "The wife, and the daughters also, both parents, brothers likewise, and their sons, gentiles, cognates, a pupil, and a fellow-student : on failure of the first among these, the next in order is indeed heir to the estate of one who departed for heaven leaving no male issue. This rule extends to all [persons and] classes."

If it is asked what then is the order, we must take it that the author of the Mitakshara intends the several persons comprised in each class, whether named or not named, to take according to their nearness of consanguinity for which purpose we have to apply the general principles of Hindu Law. We think the learned Judges have correctly interpreted the Mitakshara when they say that the rule of propinquity is effectual without any exception in the case of Samanodakas and Bandhus and that no preference ought to be based upon superior religious efficacy notwithstanding that there are decisions both of the Privy Council and of this Court which proceeded upon the view that preference may also be grounded upon religious efficacy.

Proceeding to examine the grounds of decision we find that the learned Judges based their view upon—(1) The authority of the *Smriti Chandrika*, the *Sarasvati Vilasa* and the *Vyavahara Mayukha*; (2) the authority of West and Buhler and Mandlik; and (3) the rule of the *Mimamsa* that effect should be given to the order in which persons and things are named unless the sense requires a different order,—see *Jaiminiya Nyayamala*, Ch.V, Adhikarna 4. As

regards the *Smriti Chandrika*, reliance is placed upon the following passages: "(13) Bandhuvâh cognate kindred. A description of these is given as follows, in a different Smriti: *according to their order of relationship* (14). The sons of his own father's sister, the sons of his own mother's sister, and the sons of his maternal uncle must be considered as his own cognate kindred. The sons of his father's paternal aunt, the sons of his father's maternal aunt, and the sons of his father's maternal uncle, must be deemed his father's cognate kindred. The sons of his mother's paternal aunt, the sons of his mother's maternal aunt and the sons of his mother's maternal uncle, must be reckoned his mother's cognate kindred." [The Smriti Chandrika translated by the late Sadr Amin Krishnaswami Iyer of Madras, Chapter XI, S. 5, Placitum 13 and 14, pages 196 and 197]. Placitum 15—"Of the kinsmen, distant kinsmen, and cognate kindred, in default of one that stands nearest in the order *expressly* given"—has no bearing; and in fact is not in any way relied upon by the learned judges. The passage relied upon by the judges as supporting their view is in Placitum 13, *viz.*, "A description of these is given *according to their order of relationship.*" Unfortunately the original Sanskrit has not been published and we have not been able to lay our hands upon any Sanskrit copy or manuscript. As it reads, the passage is not conclusive. The author of the *Smriti Chandrika* states merely that a description of the Bandhus is given in another Smriti according to the order of relationship and that Smriti is then cited. The author in referring to the order of relationship may have referred to the order of relationship amongst the classes of Bandhus, *viz.*, the class of Atma Bandhus, Pitru Bandhus and Matru Bandhus, and that is how the text is cited by the author of the Mitakshara, and there is no reason to suppose that the author of the Smriti Chandrika has intended differently. Again the learned Judges rely upon the summary given by the translator at page 198. A little reflection, however, will show that this summary cannot be relied upon. The translator proceeds upon the basis that the persons mentioned in the text are exhaustive of the class of Bandhus and that is why he omits the sister's son, the maternal uncle and many other nearer relations. The translator made his translation in 1867 when the decision of the Privy Council in

Girdari Lal Roy's case above referred to had not been passed, and it will be unsafe, therefore, to rely upon the position given translator in his summary.

As regards the *Sarasvati Vilasa* we are upon surer ground. We have the Sanskirit original to compare with the translation. The passages bearing on the question of Bandavas are Ss. 595 to 598, p. 119, of Rev. Foulkes' Translation of *Sarasvati Vilasa.*

[595]. The Bandhavas are exhibited in another law-code in the order of their greater propinquity. 'The sons of a man's own paternal aunt, the sons of his own maternal aunt, and the sons of his own maternal uncle, are recognised as a man's own Bandhavas. The sons of his father's paternal aunt, the sons of his father's maternal aunt, and the sons of his father's maternal uncle, are recognized as his father's Bandhavas. The sons of his mother's paternal aunt, the sons of his mother's maternal aunt, and the sons of his mother's maternal uncle, are recognized as his mother's Bandhavas'.

[596.] If there are no Gotrajas, the connection through property belongs to these.

[597.] There also, the order to be recognized is, that a man's own Bandhavas first take the property on account of their nearer relationship; if there are none, the father's Bandhavas take the property; if there are none, the mother's Bandhavas.

[598.] It must not be said here, that because of the greater eligibility of the mother than of the father, the enjoyment of the property belongs to her Bandhavas before the father's Bandhavas. We perceive it to be right that the enjoyment of the property should belong to the mother's Bandhavas after the father's Bandhavas, because, by the text; 'Of these, the mother is more venerable than the father," the greater eligibility belongs to the mother alone, and not to the mother's Bandhavas.'

The passage relied upon is apparently that at the beginning of S. 595. The Sanskrit original is बान्धवास्त्वासन्नतर क्रमेणैव स्मृत्यन्तरे दर्शिताः । *i.e.*, "Now the Bandhavas are shown (explained) in another Smrithi in (the order of greater nearness)." Then the Smriti is cited. The order referred to is the order referred to in S. 597 and that is the order among the classes of Bandhus, and this is exactly as the author of the Mitakshara states

Even if S. 597 is absent, the beginning of the passage in S. 595 does not necessarily lead one to the conclusion that in the Smrithi cited the persons are named in the order in which they take. If the Smrithi is to be taken as meaning that the persons named therein are to take in the order in which they are mentioned, that will be inconsistent with the view now definitely settled that the persons therein named are only illustrative of the class and that other persons not named in the text will be entitled to take. Strangely enough there is a curious inconsistency in the judgment not expected of the learned Judges. In one passage of the judgment they state: " It is strange, however, that though there is discussion and a decision in Placita 597 and 598 as to the precedence of Atma Bandhus over Pitru Bandhus and of the latter over Matru Bandhus, there is none as to the order amongst Bandhus of each class." This is exactly the view we have taken and stated above of the *Sarasvati Vilasa.* In another passage, however, the learned judges state they prefer the mother's sister's son on the express authority of the *Sarasvati Vilasa* among others, and cannot for that reason accept the principle laid down in *Tirumalachari* v. *Andalammal.*[1]

The next authority relied upon is that of the Vyavahara Mayukha which, it need hardly be stated, is an authority only in Bombay. However it may be useful to see how the text is construed by the author of this work. The translation given by Mr. Colebrooke is this: "If no distant kinsmen (Sodaka) exist, then come the cognate kindred (Bandhu), who are thus specified in another Smrithi. [The text in the Smrithi is then translated. * * *]. Here also the order (of succession) is even the order of the text." Borrodaile's Translation, Vyahara Mayukha, p. 82. The Sanskrit for the last sentence is this:" अत्रक्रमः पाठिक एव." The meaning is: " Here the order is even conformable to the text." Accepting Mr. Colebrooke's translation the question still is: What is meant by the order of the text? Does not the author mean by it that the order as to the three classes of Bhandhus which is stated in the text and not that the order of the persons enumerated is to be adopted ? The author of the Mayukha does not expressly say that it is the latter, and

1. (1907) I. L. R. 30 M. 406.

when we find from most of the authoritative texts on Hindu Law that the order that is intended is taken to be the order as to the three classes, it is difficult to accept the view that Nilkhanta necessarily means that the order is as to the persons enumerated in the different classes.

This is exactly the view that has been taken as to the construction of this passage of the Mayukha by the Bombay High Court in *Mohan* v. *Krishnabai*[1] and it is strange that while the learned Judges had before them this case and referred to it in their judgment their attention should not have been drawn to the passage of the judgment in that case in which the learned Judges of the Bombay Court say that " Placitum 22 treats of the bandhus, and, after quoting the text in which they are enumerated, Nilakanta adds ; ' Here also the order of succession is even the order of the text,' but by this he seems to intend no more than is stated in the Mitakshara, (Ch. ii, Sec. 5, pl. 2) *viz.*, that, ' by reason of near affinity, the cognate kindred of the deceased himself are his successors in the first instance ; on failure of them, his father's cognate kindred : or, if there be none, his mother's cognate kindred." If this passage had been brought to their Lordships' notice they would not have relied upon the Vyavahara Mayukha or upon the opinion of Messrs. West and Buhler in support of their view.

Before proceeding to consider the English Text writers referred to by the learned Judges we may state here that the recognition of Bandhus as heirs, marks a comparatively late stage in the development of Hindu Law. Manu does not recognize them as heirs at all. In Chapter, IX, § 185 to 187, Manu says :—" The father shall take the wealth of the sonless son deceased ; or the brothers. To three, libations of water must be offered and to three the *pinda* is given. The fourth is the giver of them and the fifth has no concern. To the nearest amongst the *sapindas* goes the wealth of the deceased. After them all, a *sakulya*, the spiritual teacher or the pupil takes it." No reference is here made to the Bandhus. The Sakulyas referred to in the

1. (1881) I. L R. 5 B. 597 at p. 601.

above verses of Manu is explained by the author of the Vivadaratnakara as meaning Samanodakas. Again the term *Bandhu* occurring in Vishnu is explained to mean Sapinda and not the Bandhu of Yajnavalkya as explained by the author of the Mitakshara. Vishnu says: "The wealth of a man dying without male issue goes to his wife; in default of her, to his daughter; in default of the daughter, to the father; in default of the father, to the mother; in default of the mother, to the brother; in default of the brother, to the brother's son; in default of the brother's sons, to the Bandhus; in default of the bandhus, to the Sakulyas; in default of them to the fellow-student; in default of him, to the King, except the wealth of a Brahmin"—Vishnu XVII-4-13. The author of the Vivadaratnakara says that Misra explains Bandhus in this text of Vishnu as meaning 'Sapindas,' and Sâkulyas as meaning 'men of the same gotra'. When Bandhus began to be admitted they were apparently admitted slowly and cautiously. Apararka, a commentator on Yajnawalkya Smriti, only mentions the Atma Bandhus as entitled to the succession. The Pitri and Matri Bandhus are not mentioned by him. Hence when all were admitted, the view might have prevailed that only the persons mentioned and not any others, were entitled to take. *See* the discussion on this subject by Mr. GHOSE in his book on *Hindu Law*, pp.183 to 194 (2nd Edn.) where that author says that even Yajnavalkya understood by the term bandhus only agnates as understood by Vishnu.

Coming to the present discussion we may, however, state that the author of the Madana Parijata seems to support the view taken by the learned judges. "In the absence of gotrajas, Bandhus take the wealth. Bandhus are of three kinds, *viz.*, Atma Bandhus, Pitri Bandhus, and Matri Bandhus; as is laid down by Vriddha Satatapa. The sons of one's father's sister, the sons of one's mother's sister, and the sons of one's mother's brother are known as one's Atma Bandhus. The sons of one's father's father's sister, the sons of one's father's mother's sister and the sons of one's father's mother's brother are known as one's Pitri Bandhus. The sons of one's mother's father's sister, the sons of one's mother's mother's sister and the sons of one's mother's mother's brother are known as one's Matri Bandhus'. In this case also, *according to the order of enumeration*, the Atma Bandhus get the wealth first'

because of their nearness of relation. Similarly in default of them the Pitri Bandhus, and likewise in default of the Pitri Bandhus the Matri Bandhus. This is the order." This passage of the Madana Parijata more nearly supports the position taken up in this case by the learned Judges than either of the passages in the Smriti Chandrika or Vyavahara Mayukha relied upon by them. Even this passage, however, is open to the construction we have already pointed out, *viz.*, that the order mentioned or enumerated is the order as to the classes of Bandhus. However this may be, Vignaneshwara, the author of the Mitakshara, has always taken a more liberal and sensible view with regard to many of these matters. According to him, whoever may be comprised among the class of Bandhus who have been described by him as kinsmen sprung from a different family, but having particles of the same body (Ch. 2, S.5, Pl. 3) will be entitled to take in default of the gotrajas. Among these the Âtma Bandhus are entitled to take in the first instance; in their default the Pitribandhus and in default of these, the Mâtribandhus. This is the order stated in the text variously ascribed to Vriddha Satatapa, Vriddha Manu and Baudhayana, and accepted by the author of the Mitakshara. The order of preference among Âtma Bhandus *inter se*, the Pitri Bandhus *inter se* and the Mâtri-Bandhus *inter se* is left by the author of the Mitakshara to be inferred from the various general principles stated by him when describing the order of succession among the gotrajas and the various other persons named in the leading text of Yajnavalkya which he comments upon. An exactly similar view has been taken by the author of the Vyavahara Madhaviya which is also one of the leading authorities in this Presidency. "Three classes of Bandhus are indicated by Baudhayana: 'The sons of one's father's sister, the sons of one's mother's sister and the sons of one's maternal uncle should be known as one's Âtma Bândhavas. The sons of one's father's father's sister, the sons of one's father's mother's sister and the sons of one's father's maternal uncle should be known as one's Pitri Bândhavas. The sons of one's mother's father's sister, the sons of one's mother's mother's sister and the sons of one's mother's maternal uncle should be known as one's Mâtri Bhândhavas'. Even among Bandhus he alone who is nearest takes the wealth first. Hence alone Brihasphati says; 'Where there are many

gnâtis, Sâkulyas and Bandhus, he who is nearest among them takes the wealth of the sonless deceased.' " See also Dr. Burnell's translation, p. 29. Here it will be observed that the author states that even amongst Bandhus he alone who is the nearest takes the wealth first. If the nearest is the person named in the text, or if the order in which the persons are enumerated shews the order of nearness, the author would have found no difficulty in saying so. It is because the author finds that the order is not the order of nearness that he states a general principle, *viz.*, the nearer among them takes first; and the nearness has to be found out according to the principles laid down in other places. Manu's text (Ch. IX, § 187) is relied upon both by Vijnaneswara and by the author of the Parasaramadhaviya as laying down the principle to be followed. We think this passage of Parasaramadhaviya is conclusive upon the question and shows that the order in which the persons are enumerated in the text is not the order in which they are entitled to take.

The *Viramitrodaya* which according to the authority of the Judicial Committee in *Girdhari Lal Roy* v. *The Bengal Government*[1] is also one of the leading authorities in the Mitakshara School of Law is substantially to the same effect as the Parasaramadhaviya. "On failure of the Samanodakas the bandhus are heirs. Bandhus are of three descriptions: the Bandhus of a man himself, the Bandhus of the father, and the Bandhus of the mother. To this effect is the Smriti cited * * * . Here also the order is that by reason of greater propinquity, first one's own Bandhus, after them the father's bandhus, and after them the mother's bandhus."

Before leaving this branch of the argument we have to refer to a passage in the Vivâdachintâmani, one of the leading authorities of the Mithila School, a subdivision of the Mitakshara School. The author of the Vivadachintamani says: "On default of Sagotras Bandhus succeed, according to the text of Yajnavalkya. Bandhus are of three kinds, *viz.*, one's own Bandhus, father's Bandhus and mother's Bandhus." After citing the text which deals with the nine Bandhus arranged in three classes he states: "These are entitled to succeed in their order. Balarupa is to the same effect." If this had stood alone

1. (1868) 12 M. I. A. 465.

it could at most be like the passage in the Smriti Chandrika or the passages in the Vyavahara Mayukha which, according to our construction, refer only to the order as to the three classes, or which at any rate are of doubtful construction. But the matter does not end there so far as the Vivadachintamani is concerned. The author has given a summary of what has been said by him before, *i.e.*, as to the order of persons entitled to succeed. After mentioning the son, &c., down to the remote Sapindas he states: "In their default the near Sakulyas; in their default the distant Sakulyas; in their default the maternal uncle, &c." That is certainly not accepting the order of preference of the persons enumerated in the text. Provanar coomar Tagore in his translation given a curious order of succession. He places first the 3 Pitri Bandhus successively and then the 3 Matri Bandhus. The 3 Atma Bandhus an placed last to take simultaneously.

Summing up the result of our discussion as to the opinions of the Digest writers we find that the Vyavahara Mayuka does not support the view of the learned Judges in the light of the decision of the Bombay High Court in *Mohan Das v. Krishnabhai.*[1] The Sarasvati Vilasa, the Viramitrodaya, the Mitakshara and even the Smriti Chandrika are, at any rate, inconclusive upon the question; they only accept the order as to the three different classes of Bandhus. The Madana Parijata which has not been referred to in the judgment, and which has not been regarded up till now as any authoritative work, may, upon the most favourable construction, be said to lean in favor of the view taken by the learned Judges, but as against this, and apart from its doubtful authority, we have the Parasaramadhaviya which certainly does not accept the view taken by the learned judges. In our opinion the Sarasvati Vilasa is equally conclusive with the Mitakshara in accepting only the order as to classes. And, as already pointed out, there is a strange inconsistency in the learned judges stating that the author of the Sarasvati Vilasa does not refer to the order as to the persons enumerated and relying at the same time upon him as an authority in favor of their view.

As regards the English Text writers, reliance is placed upon Messrs. WEST and BUHLER and MANDLIK. The former writers, doubt, state in the introduction to Book I at p. 134 that "they

1. (1881) I.L.R. 5 B.597.

(the nine specified Bandhus) apparently succeed in the order in which they have been enumerated," but this is not consistent with their remarks in Book I, Chap. 2, S. 15. At p. 488 they say: "The enumeration may perhaps be intended to mark merely the extreme terms of the Sapinda-relationship, the connection on one side or both being established through a mother, and extending only to four steps between the persons regarded as Bandhus." Again, at p. 491, the learned authors state: "It would seem, however, that the nine Bandhus mentioned in the law books ought to be placed first, if effect is to be given to the principle of the Mayukha that 'incidental persons are placed last.' Amongst the other Sapindas 'nearness to the deceased' ought, as the Sastris also seem to indicate, to be the principle regulating the succession. In the case of *Mohan Das* v. *Krishnabai*[1] it was held that this latter principle must prevail over the rule as to incidental persons even amongst Bandhus, and that a mother's sister's son was excluded by maternal uncles of the propositus. Reference is made to *Amrit Kumari Debi* v. *Lakhinarayan*[2] as well as to *Girdhari Lal Roy's case*[3], and it may probably be considered as now finally settled that the mention of the Bandhus in the rule is not exhaustive, and *does not give precedence to any one enumerated over others nearer to the propositus in the same line of connexion.*"

The last passage shews that in the opinion of the authors the cases would seem to point out that the order stated in the text is not the order of precedence. Of course the authors might as well have said that, so far at any rate as regards the persons mentioned, the order in the text should be observed, but this reservation they do not make. At any rate we must take it that the authors only state their opinion, if any, with much hesitation as observed by the Bombay High Court in *Mohan Das* v. *Krishna Bhai*[1]. It may be observed that in prior editions of Messrs. WEST & BUHLER *i.e.*, in the editions prior to the decision of the Bombay High Court in *Mohan Das* v. *Krishna Bhai*[1], the learned authors were more positive in their remark in Book I, Ch. II, S. 15, dealing with Bandhus, but after this decision they changed their opinion; but by a curious oversight, very common to most authors, they did not change their language in the previous portion of their book.

1. (1881) I.L.R. 5 B. 597. 2. (1868) 2 Beng. L.R. 28.
3. (1868) 12 M. I.A. 448.

The next writer that is relied upon is the late Rao Sahib MANDLIK. His note appears in the translation of the Mayuka, Ch. 4, S. 8, Pl. 22. But as already stated with reference to Messrs. WEST & BUHLER, the Bombay High Court holds that this construction cannot be adopted and that the order referred to by Nilakanta Bhatta is the order as to classes. Apparently this note is a translation of the note in Sanskrit appearing at p. 54, where the corresponding Sanskrit of the Mayukha Ch. 4, S. 8, Pl. 22, is given. It is there said अवान्तरबन्धुविषये ऽपिपाठिकक्रम एवेतिवेदितव्यं । अणुरपिविशेषोऽध्यव-सायकर इति न्यायात् ॥. This only reads that "even as among intermediate (or intervening) Bandhus the order conformable to the text alone should be understood owing to the reasoning (or rule or argument) that even slight distinction or peculiarity makes the determination, *i.e.*, (the rule that very little preponderance turns the scale if other things are nearly equal)." The authorship of the above passage does not appear and little weight can therefore be placed upon the note. Apart from this the argument (or reasoning) itself indicates that it is very inconclusive and that it can be adopted only when there is nothing else indicated. It cannot be said to apply where there is a principle well recognized, *viz.*, that the nearer excludes the more remote.

Besides these two writers it may be stated that there is another writer who supports the view taken by the learned Judges in this case. SHYAMACHARAN SIRKAR in his *Vyavastha Chandrika*, Vol. II, S. 7, *v.* 170, states: "These (cognates) inherit according to the order of their proximity. That is to say, first the deceased's own *bandhus*, in their default, his father's *bandhus*, and failing them, his mother's *bandhus*, take the inheritance." But lower down he states: "It appears that bandhus of each kind do not inherit all simultaneously, but one after the other as enumerated in the text. Hence among one's own bandhus his father's sister's son succeeds in the first instance, next his mother's sister's son, and then his maternal uncle's son. His father's bandhus too succeed in the same order, and so do his mother's bandhus." For this position he relies upon the passages in the *Smritichandrika*, the *Vyavahara Mayukha* and the *Vivada Chintamani* already cited, and we have already shewn that these passages do not support this position.

As against these we have the authority of Mr. MAYNE in the passage in S. 579 cited by the learned Judges and in the

table at p. 763. He places the maternal uncle's son first and then the maternal aunt's son. We do not refer to the two writers SARVADHICARI and BHATTACHARI as their interpretation or rather misinterpretation of VRIDDA SATATAPA'S text can hardly be supported and in fact has been completely dissented from both by the Madras High Court and the Judicial Committee in *Muthusawmi* v. *Muthukumaraswami*.[1]

The last reason relied upon by the learned Judges is that based upon JAIMINI'S *Nyaya Mala*, Chap. v., Adhikarana 4. It may be useful to point out that with reference to sacrificial law it is very necessary to consider the order in which things and acts have to be done, and the rules propounded in the *Mimamsa* upon this matter have been applied in the civil law. When the question arises with reference to the order of succession various rules are laid down and of these we need consider only three: (1) Where the order of succession is declared by express Srutis; here there can be no difficulty. The order mentioned in the Sruti should be followed. This is called Srutikrama. (2) Where no such express order is declared by the Sruti the order in some cases is determined by the sense of the passage. This is called Arthakrama. (3) The order is sometimes indicated by the order in which texts appear. This is called Pâtakrama. The question whether this last is the order to be applied will depend upon various circumstances. It cannot be taken as a general rule that the order in which the persons are named in the Smriti is the order in which they are entitled to take. If in the Sruti or Smriti persons are enumerated for a different purpose and this text of the Sruti or Smriti is cited by the writer of a Digest for a different purpose, it cannot be supposed that the author of the Digest also has that order in view unless it so appears from the context. As we have already shewn the author of the Mitakshara, in citing the text of Vriddha Satatapa under discussion, clearly indicates that he accepts only the order as to classes mentioned in that text and not the order among the persons comprised in each class. Again it is only when the Arthakrama fails that resort can be had, if at all, to the Pâtakrama.

We have already shown that, taking the sense of the passage in the Mitakshara in which this text is cited, Vignaneswara

1. (1893) I. L. R. 16 M. 23 at 30 and (1896) I. L. R. 19 M. 405 (P.C.)

accepts only the order of classes mentioned in the text, and leaves the question of preference among the persons in the class to be determined by the principle of nearness of consanguinity stated by him when dealing with the succession of parents, brothers and gotrajas. Again, there is a distinct indication in the Madhaviya that the Pâtakrama is not to be applied. The author relies upon a text of Brihaspati as to the order of nearness and thus rejects the order which may be inferred from Pâtakrama.

Lastly we think the learned Judges have somewhat misunderstood, or at any rate misapplied, the rule embodied in the principle of Pâtakrama. The rule as to Pâtakrama is not applicable when the words occur in the same sentence (or vachana). It is upon this principle that JIMUTAVAHANA declares that the text of Manu—" When the mother is dead, let all the uterine brothers and the uterine sisters equally divide the maternal estate"—should be construed as giving the mother's property to the brothers and sisters simultaneously and not one after the other. Here, there are three distinct verses (or vachanas) dealing with the three classes and, therefore, the author of the Mitakshara was right in accepting only the order as to classes although he does not say that he arrives at that construction by the rule of Pâtakrama. Further where the term च (and) occurs, the rule of Pâtakrama can have no application. If it be said that upon this view the inference will be that the persons named will take simultaneously we may say that this inference, if any, is negatived by the text of Manu cited and relied upon by the author of the Mitakshara that the nearer excludes the more remote.

Again, it may be stated that the Pâtakrama cannot be accepted as it will be contrary to the text of Manu, Ch. ix, 187, which gives the inheritance to the nearest Sapinda and this text of Manu is relied upon by the author of the Mitakshara and by other writers who are authorities in the Mitakshara School as a principle to be observed in the order of succession. Further, where there are a number of contradictory texts they must only be understood to indicate the right of the persons stated in them to succeed and not the order of succession (see the explanation in the Parasaramadhaviya when discussing the paternal grandmother's right to succeed). Here we have seen that according to some, Bandhus as understood by Yajnavalkaya were not

entitled at all and according to Apararka only the Atma Bandhus were entitled. Hence the text of Vriddha Satatapa should be taken as giving the persons a right to succeed and not as giving the order of succession.

So, if the rule as to the order of text, *viz.*, Pâtakrama, be observed as to these verses or texts, we have only the order as to classes, *viz.*, that among the Bandhus the Atma Bandhus of whom three are named take first, on their default, the Pitribandhus of whom also three are named take next; and lastly in default of the Pitribandhus, the Matribandhus. Thus we see that the reasoning based upon JAIMINI'S text does not support the view taken by the learned Judges. Further, such rule can have no application where the author of the Mitakshara adopted only the order as to classes as mentioned in the text and says nothing about the order among the persons in each class. The principle *expressio unias exclusio alterius* is equally applicable to Hindu Jurisprudence.

Before leaving this subject we have to refer to a few of the cases referred to by the learned Judges. We think that the question of preference raised in this case should be decided with reference to the principle that as between the bandhus of the same category and of the same degree, regard should be had to the preponderating influence in the Hindu system of law of relationship through males as a circumstance indicating preference and that, therefore, a person who has to trace his relationship to the common ancestor through two females will be postponed to one tracing his relationship through one female only—a principle left undecided by the High Court of Madras in *Krishna Aiyangar* v. *Venkatarama Aiyer*,[1] but affirmed in *Tirumalachar* v. *Andalamma*.[2] The learned Judges of the Division Bench did not give effect in this case to this principle on the ground that the principle itself was subject "to other considerations being equal" and that according to them "the other considerations were not equal" because of the authority of the Smriti Chandrika, the Sarasvati Vilasa and the Vyavahara Mayukha. We have already shewn that the Sarasvati Vilasa does not support the Judges and is exactly similar to the Mitakshara. We have also shewn that the Vyavahara Mayukha does not support the Judges and that the Bombay High Court in *Mohan Das* v. *Krishen Bai*[3] have taken a different view of the passage of Mayukha. As regards the Smiriti Chandrika we think that it does not advance the matter much and

1. (1905) I.L.R. 29 M. 115. 2. (1907) I.L.R. 30 M. 406
3. (1881) I.L.R. 5 B.597.

that the author cannot have intended to have said more than the order as to classes. In the absence of the original, however, we cannot be assertive, but even if the author of the Smriti Chandrika be taken to have said it expressly that the order as to the persons enumerated in the text should be observed, we think that such a view conflicts with the Mitakshara and the other authorities governing the Mitakshara School, and in the case of such a conflict there has been a uniform course of decisions in this Presidency that the authority of the Mitakshara prevails over that of the Smriti Chandrika—see *Raju Gramany* v. *Ammani Ammal*.[1] If the rule as to spiritual benefit has to be applied in deciding questions of preference (notwithstanding that the Mitakshara may not strictly justify this rule) as it ought to be if the decisions enunciating this rule even as regards the Mitakshara School cannot be got over now, we have another principle indicated for preferring the mother's brother's son to the mother's sister's son.

Now that the enumeration of Bandhus in the text is held to be illustrative and not exhaustive we think it illogical and unreasonable to hold that the order of succession among bandhus should be in the order enumerated in the text. It is more logical, if the enumeration is said not to be exhaustive, to hold that the order of succession among the enumerated and the unenumerated Bandhus should be in accordance with the principles recognized by the Mitakshara elsewhere and it is not consistent with sound principles of construction to accept the order stated in the text as regards the persons specified in spite of its being held that there are other persons comprised in each class Of course, as Lord *Halsbury* has said, law is not always logical, but notwithstanding Lord *Halsbury's* statement Judges reason logically and apply principles logically unless they are constrained to uphold principles well settled otherwise. We think there is much force in the observation of the learned Judges of the Bombay High Court in *Mohan Das* v. *Krishna Bai*[2] that "when it is once admitted that the list of Bandhus given in the text is not exhaustive, and that certain other relatives take before some of those specified in the list, there is no other logical conclusion except that the relative who, as nearest of kin, is capable of conferring the greatest spiritual benefit on the soul of the deceased, must in all cases be preferred to more remote Bandhus." This view is supported by the opinion of the Judicial Committee in a case analogous or akin to the matter on hand (*Bai Kesserbai* v. *Hunsraj Moraji*)[3]. The question there was as to the construction

1. (1906) I.L.R. 29 M. 358, 2. (1881) I.L.R. 5 B. 597. (3) (1906) I.L R.30B.431.

of the text of Brihaspati declaring the succession to women's property. Their Lordships held that the context in which the text occurred did not appear, that the enumeration in the text was obviously not exhaustive, and that the order of succession was not indicated in the text.

CRITICAL NOTE.

Recovery of Money Paid in respect of a Transfer that fails for Want of Registration.

[*Ardesir Bejonji Surti* v. *Syed Sirdar Ali Khan.*]

(I.L.R. 33 B. 610.)

It is difficult to follow some of the observations in this case. For the present purpose the facts may be briefly stated. A person gets into possession of certain premises under a lease that is invalid for want of registration. The agreement to lease is also unregistered. Under the terms of the lease the tenant deposits with the lessor a sum of money by way of security for the due performance of the conditions of the lease. Long before the expiry of the term fixed, the lessor re-enters for an alleged breach, and the tenant, denying that he is guilty of any breach, claims refund of the deposit. The lease being invalid (for want of registration) can the lessee recover the amount of the deposit ?

The learned Judges rightly hold that the lease, though unregistered, may 'be put in evidence for a collateral purpose,' *i. e.*, for the purpose of proving 'a money debt arising from the conduct of the parties.' That on the facts above set out, a claim 'in the nature of a debt' arises, they hold, on the principle of *Pulbrook* v. *Lawes*[1]. And then they refer to the rule of estoppel as laid down in *Cornish* v. *Abington*,[2] that if from one's *conduct* (whatever his intention may be) another reasonably infers the existence of an agreement and acts upon such inference, the former cannot afterwards gainsay such inference.

With all respect we venture to doubt the application of the last mentioned principle to the facts before the Court. The effect of applying the rule of estoppel would be that, as against the party estopped, the Court must hold that there is a *valid* lease and give effect to it for all purposes and not merely to *imply a debt.* This, in fact, is the principle that underlies the

1. (1876) 1 Q.B.D. 284. 2. (1859) 4 H. & N. 549.

English rule as to the effect of part performance. (See *Caton* v. *Caton* [1]; *Maddison* v. *Alderson*[2].) But the preponderance of authority in this country is in favour of the view that no such principle could prevail as against the positive provisions of the Statute Law. The Transfer of Property Act is more stringent than the Registration Act or the Statute of Frauds. No-compliance with its provisions has been held not merely to *exclude proof of* but to invalidate the transaction; and the law of estoppel cannot be allowed to frustrate the avowed policy of the Legislature. (See *Kurri Veera Reddi* v. *Kurri Bapireddi*[3].)

The principle of *Pulbrook* v. *Lawes*[4] is based not on the rule of estoppel but on the doctrine of unjust enrichment (see KEENER on *Quasi-Contracts*, pp. 278-9).

Another aspect of the case put forward in support of the claim was that, the lease being void, the lessee was entitled to recover the deposit, under S. 65 of the Contract Act, and reliance was placed on *Casson* v. *Roberts.*[5] Having regard to the fact that the contract had, nevertheless, been given effect to, and the plaintiff had enjoyed *some* benefit under it, it is doubtful whether the claim on the basis of a 'failure of consideration' could be sustained (see KEENER, p.305). And it is also difficult to bring the case strictly within the language of S. 65 of the Contract Act. But the learned Judges answer the contention in a different way. They adopt the view of MR. CHITTY (in his book on *Contracts*) that 'the mere fact of one party having paid money to another under a contract which he cannot enforce against the latter because of its non-compliance with the provisions of the Statute of Frauds, will not entitle the party who has paid such money to recover the same as on a failure of consideration; for in such a case the contract is not void but there is merely a deficiency in the evidence thereof.'

With reference to this statement of MR. CHITTY it has to be said that the judgment in *Sweet* v. *Lee*[6], which is cited in support of it, is so laconic that it is difficult to discover the basis of the decision. In the argument several suggestions were made on both sides, and, having regard to the remarks of the Judges in the course of the argument, it would rather seem that the basis of the decision was that the plaintiff, having voluntarily made the payment with knowledge of the nature of the memo-

1. (1866) L.R. 1 Ch. at p. 148.
2. (1883) L.R. 8 A.C. at p. 477.
3. (1904) I.L.R. 29 M. 336.
4. (1876) 1 Q. B. D. 284.
5. (1862) 31 Beav. 613.
6. (1846) 3 Man. and G. 452.

randum embodying the contract—which was held insufficient to satisfy the Statute of Frauds—was merely the victim of ignorance of *law* and was not entitled to recover. (Cf. *Thomas* v. *Brown*[1] which is treated in HALSBURY'S *Laws of England*, Vol. VII, Art. 789, as similar to *Sweet* v. *Lee*;[2] see also LEAKE on *Contracts*, p. 62.) The principle underlying this class of cases is thus explained in an American case :—"The money was voluntarily paid by the plaintiff upon a promise made by the defendant. The former knew at the time he could not oblige the latter to perform, but which promise he nevertheless agreed to accept as a sufficient consideration for the money. The money was not received by the defendant as a loan but as a payment. It was not received for the plaintiff's use and *as long as the defendant is willing to do what he agreed to do in consideration of the payment*, the Court will not presume any promise to repay it, but will leave the parties to stand where they voluntarily placed themselves." (*Collier* v. *Coates.*[3] Cf. KEENER, pp. 232 *et seq.*) In SMITH'S *Leading Cases* (Tenth Edn., Vol. I, p. 301) *Sweet* v. *Lee*[2] and *Thomas* v. *Brown*[1] are regarded as cases in which oral evidence was admitted to show that the 'payments made to the defendant were *not made without consideration*.' And in the passage in HALSBURY'S *Laws of England* (above referred to) a distinction is drawn, in connection with such cases, between a claim 'for money paid at the defendant's request' and that based 'upon a failure of consideration.' Cf. *Knowlman* v. *Bluett* [4] and *Mc Gregor* v. *Mc Gregor.*[5] It is true that a contract unenforceable on account of the Statute of Frauds is nevertheless 'an existing contract' and is not void altogether (*Britain* v. *Rossiter*[6]), but if on the strength of the Statute *the defendant repudiates the contract* (which was not the case in *Sweet* v. *Lee*[2] or *Thomas* v. *Brown*[1]) it is difficult to see why plaintiff should not recover money paid by him under the contract, at any rate in cases in which he has had no benefit whatever from it. (See LEAKE on *Contracts*, p. 199 ; KEENER, p. 277 *et seq* ; *Gosbell* v. *Archer*[7]; *Casson* v. *Roberts.*[8]) The doubt thrown on *Casson* v. *Roberts*[8] in *Thomas* v. *Brown*[1], relates evidently to the denial in the former case of any distinction between non-performance of the contract on account of the plaintiff being in default and the non-performance resulting from the default of the defendant.

1. (1876) 1 Q.B.D. 714.
2. (1846) 3 Man. & G. 452.
3. 17 Barb. 471.
4. (1874) L. R. 9 Ex. 307.
5. (1888) 20 Q. B. D. 529.
6. (1879) 11 Q. B. D. 123.
7. (1835) 2 A. and E. 500.
8. (1862) 31 Beav. 613.

But whatever the effect of non-compliance with the Statute of Frauds may be, we find it difficult to believe that the learned Judges of the Bombay High Court could have intended to hold the principle quoted from MR. CHITTY'S book to be applicable *generally* to cases of transactions which are invalid for non-compliance with the provisions of the Transfer of Property Act. For the moment they would seem to have lost sight of the difference between the effect of non-compliance with the formal requirements of the Statute of Frauds and that of non-compliance with those of the Transfer of Property Act. The decision of the Full Bench of the Madras High Court in *Kurri Veera Reddi* v. *Kurri Bapireddi*[1] is a good illustration of the distinction. If in return for the money paid by him, a vendee or lessee gets *no interest or right* whatever because the document executed in his favour is not registered as required by law it seems to us to be as good a case of 'failure of consideration' as any other.

If the matter rested only on the provisions of the Registration Act, it may be said that it amounts only to an exclusion of evidence, that the executant is under no *obligation* (express or implied) to get the document registered (cf. *Gooroo Pershad Roy* v. *Roy Dhunput Singh*[2]) and that if the claimant does not avail himself of the procedure prescribed by the Act to get the document registered he has only himself to thank. Cf. *Venkatasami* v. *Kristayya.*[3] But where the Transfer of Property Act prescribes a registered document as a condition precedent for a valid transfer, there is an implied obligation on the transferor to do everything necessaryto give his transferee a good title and if the former fails or refuses to do so the latter may well claim to treat it either as a breach of contract or (where the contract, whether *void* or not, is unenforceable) as a failure of consideration. The distinction above suggested seems to be borne out by the explanation given in *London Founders Association, Ltd.* v. *Clarke*[4] of the decision in *Wilkinson* v. *Lloyd*[5].

NOTES OF INDIAN CASES.

Mata Din *v.* Gaya Din.:—I. L. R. 31 A. 599.—A minor son was added as a party to a suit against the father in respect of a personal debt due by the latter. But (as assumed by the

1. (1904) I.L.R. 29 M. 336.
2. (1870) 14 W. R. 20.
3. (1893) I. L. R. 16 M. 341.
4. (1888) 20 Q. B. D. 576.
5. 7 Q. B. 27.

Court) the minor was not properly *represented* in the suit and must therefore be taken to have not been a party to it. All proceedings, including those in execution, nevertheless ran in the name of *both* father and son and a *stranger* purchased the family property in the execution sale. The purchaser subsequently brings a suit to recover possession of the properties purchased by him. Can the minor son in possession resist this claim without showing that the father's debt in respect of which the execution sale took place was tainted with illegality or immorality? The learned Judges of the Allahabad High Court say, no. We are not sure that in the combination of circumstances found in this case, the question of the son's right to impeach the execution sale is so easily answered.

Taking it, for the present, that even as against a *stranger* purchasing in the execution sale the son, if not made a party to the suit, is entitled to relief, in case he shows that the debt of the father in respect of which the execution sale took place was 'illegal' or 'immoral' (see *Mayne*, Ss. 323, 324) is there no difference in result between cases in which the son is not joined at all and those in which the creditor has in fact joined him but the joinder is in law ineffectual? While it is not the law that the son's interest will not pass unless he is made a party to the suit, the Judicial Committee recognise that in determining the extent of the operation of the sale, the presence or absence of the son on the record is a material element. And this should be so, for two reasons, *viz.*, it will be an indication as to whether or not the father is sued in his representative capacity and it will also throw light on the question, what it is that the creditor is putting up for sale. Where the son is not joined at all, the question arises whether the sale covered only the *interest* of the father or *all the interest that he could lawfully dispose of* to discharge his debt and from the circumstances in evidence in each case the Court has to decide the point. But where the son is as a matter of fact joined, is that not an indication that the suit is meant to include the *cause of action* which the creditor has *against the son* also and in respect of the execution-sale in such cases, is it not the proper *presumption* that it is in execution of the decree on this cause of action and not of the decree against the father that the son's interest is *intended* to be sold? The case of *Sivasami Chetti* v. *Sevugan Chetti*[1], though it is not a case of a *father*, bears some analogy. The fact that *in law* the joinder is ineffectual for

1. 1901 I. L. R. 25 M. 389.

want of proper representation can make no difference as to the *intention* of the parties and it is this latter that must be looked to in deciding the extent of the operation of the sale. The effect of the non-representation of the son, of course, is that the decree as against him and the proceedings in execution thereof are invalid and nothing will pass *under them* to the purchaser.

Akbar Khan *v.* Muhammad Ali Khan:—I.L.R. 31 A. 610.—Where a Court rejects an application for review on the erroneous view that it has no jurisdiction to entertain it, is the order of rejection open to revision? Sec. 629 of Act XIV of 1882 provides that an order rejecting an application for review shall be final. The question turns on the words 'reject' and 'final.' Whether "final" only means 'non-appealable' or not open to question even by way of revision, *Banerji* J. does not decide.

This doubt has now been removed by the Legislature providing in O. 47, r. 7, of the new Code that the order of rejection 'shall not be appealable' (not 'final'). [Cf. also the difference in language between S. 104, Cl. (2), of the New Code and the last clause of S. 588 of the Old Code]. The learned Judge, however, interferes in revision on the ground that the dismissal in this case of the application for review was not a 'rejection' within the meaning of S. 629, reading that section in the light of S. 626.

Bhagwan Sahai *v.* Narsingh Sahai.—I.L.R. 31 A. 612.—This case in its different stages discloses a remarkable diversity of judicial opinion. It was ultimately decided on Letters Patent Appeal that the agreement in question amounted to the creation of an easement and that it nevertheless did not require registration. On the question of the necessity for registration, in the case of such a document, Messrs. MICHELL and PEACOCK (in their books on the *Law of Easements*) take different views. *Banerji and Tudball* JJ. agree with Mr. PEACOCK whose view is also supported by the opinion of Dr. WHITLEY STOKES. The question turns mainly on the applicability of S. 54 of the Transfer of Property Act to the case. We think that the distinction drawn in the case between the 'creation' of an easement and the 'transfer' of an easement is well-founded and that the 'creation of an easement' is not a 'transfer of ownership' within the meaning of S. 54. An easement is no doubt a *jus in re alieno solo*, but it is merely a *restriction* on and not the transfer of the servient owner's rights of enjoyment.

Bai Moolbai *v.* Chunilal Pitamber.—I.L.R. 33 B. 630.—In this case *Russell* J. holds that before proceedings for

committal can be taken against a person for disobedience of an order of Court, it must be shown that the order has been *personally* served on such person as also the notice to commit. This is a wholesome rule, though the authorities referred to by the learned Judge do not seem to bear closely on the point. The particular act in respect of which proceedings were taken in the case does not seem to fall within the category known as 'Criminal' in the law of contempt (*See* HALSBURY'S *Law of England*, Vol. 7, Art. 603, *O'Shea* v. *O'Shea*[1]. cf. Art. 638) and cases like *In re Pollard*[2] and in *In re Vallabhdas*[3] do not quite apply. Relying on *Gordon* v. *Gordon*[4] the learned Judge also holds that the pendency of an appeal against the order disobeyed (except it be on the ground of want of jurisdiction) will not stay the hands of the Court in taking proceedings for contempt.

Dagdu Valad Sakharam Kumbi *v.* Totaram Valad Narayan Kumbi.—I. L. R. 33 B. 658.—This case well illustrates the distressing uncertainty that often besets a suitor in choosing the forum he is to resort to or in determining the amount of court-fee that he has to pay. One Court directs him to another and the other Court directs him back to the original Court. Thank God that there was not a difference of opinion in the High Court also—which was not at all unlikely, having regard to precedents—and a consequent Letters Patent Appeal.

The decision turned on the construction of S. 7, Cl. IV (*b*), of the Court Fees Act. In coming to the conclusion that it does not apply to suits for *partition* the learned Judges rely on the use of the words 'right to share' and not 'right to *a* share.' The attention of the learned Judges does not seem to have been directed to the cases discussing the meaning of similar language in Art. 127 of the Limitation Act. But whatever may be the true construction of that article of the Limitation Act we are by no means sure, as the learned Judges seem to feel, that suits for partition of joint family property fall under Cl. (v) and not under Cl. (iv) of S. 7 of the Court Fees Act. In laying stress on the fact that as a suit for 'possession of land' it is easily assessable in money value (for the purposes of Cl. v) the learned Judges have ignored the true nature of a partition suit. It is not brought to recover possession of land—for every member of the joint family, at any rate where there is no *exclusion*, is in law deemed to be in possession of every item of the family-property

1. (1890) 15 P. D. 59.
2. (1868) L. R. 2 P. C. 106.
3. (1903) I.L.R. 27 B 394.
4. L.R. 1904 P. 163.

—but to substitute separate possession of a share for joint possession of the whole. And the basis of valuation for purposes of Court-fees is not the value of the physical thing involved in the suit, but the value of the 'subject-matter.' If Cl. (iv) (*b*) of S. 7 is not to apply, there is more reason for falling back on Art. 17, Cl. (*b*) of the second schedule than for bringing the case under Cl. (v) of the section. For a somewhat lengthy discussion of this aspect of the question see *Bidhata Roy* v. *Ramcharitra Roy.*[1]

SUMMARY OF ENGLISH CASES.

The King *v.* Fisher. [1910] 1 K. B. 149 [C. Cr. A.]

Evidence—Admissibility of—Cheating—Evidence of other kinds of cheating—Quashing of conviction.

In a criminal trial for cheating the complainant into parting with a pony and a cart by false pretences, evidence of other deceptions by the accused on others with regard to obtaining provender on two occasions, and a horse, on another, two of them before and one after the commission of this offence, was tendered, and the accused convicted by the Jury. *Held,* that such evidence ought not to have been admitted, and that though there was enough evidence, if believed, to convict the accused of the present charge, yet inasmuch as the Jury might have been prejudiced by the irrelevant evidence, the conviction must be set aside.

Per Curiam.—Evidence of other instances of the same kind of transaction is allowed in law, though that will go to prove the commission of other offences, in order to negative the suggestion of mistake or in order to show the existence of a systematic course of fraud. As the evidence tendered was not capable of proving that the prisoner had committed the particular fraud in question, but only suggested that he was of a generally fraudulent disposition, it was inadmissible.

[Compare S. 14 of the Indian Evidence Act.—ED.]

Morris *v.* Carnarvon County Council. [1910] 1 K. B. 159.

Negligence—Invitation to use premises—Dangerous condition of premises— Liability—Transfer of rights and liabilities—Meaning of.

The defendants in this case, *viz.*, a School Committee, to whom the school and its building were handed over by virtue of a

1. (1907) 6 C.L.J. 651 s. c. 12 C.W.N. 37.

statute by a School Board who were till then managing, retained in the school building a heavy swing door unfit to be used by children without the aid of adults. The plaintiff, a girl of seven, having entered the class room late, was ordered by the mistress to leave the room and was obliged, as no adult assisted her in opening the door, to open the door herself. Before she could get out, the heavy swing door swung back and crushed her finger. *Held* that the defendants were liabe for the injury to the plaintiff's fingers inasmuch as the child was *invited* to use the swing door.

"An owner of premises upon which he invites other persons to come must not allow the presence upon the premises of anything in the nature of a hidden or concealed source of danger or, what in cases of this description is commonly called, a trap. In order to determine whether the present case comes within that principle, one must have regard not only to the nature of the thing itself but also to the class of persons who an invited or compelled to use it, and must have regard to the knowledge, judgment and physical strength of those persons What the law considers a concealed danger is not confined to things hidden from the eye alone; it extends to things hidden from the appreciation of the person injured, hidden from the combination of eyesight and knowledge of the properties of the things which the eyesight observes * * A person whose premises are dangerous is not only liable if he caused them to be so, but also if, having taken them over in a condition in which they amounted to a trap, he has omitted to remedy that condition."

Per *Phillimore* J.—It cannot be held that the statutory transfer of rights and '*liabilities*' of the old school board to the new school committee included the liability from a contingency of the dangerous door which led to no accident while it was under the former's management, causing an accident subsequently to the transfer.

Cope *v.* Sharpe, [1910] 1 K. B. 168.

Trespass—Justification—Fire—Act done to preserve property.

The defendant's master had sporting rights in plaintiff's land which was covered with heather. The heather having caught fire in some place, and the defendant, thinking that the means adopted by the plaintiff to put out the fire were insufficient, burnt, in order to keep his master's game safe, some of the

heather in a manageable way in certain places with the intention of making bare patches of ground for preventing further extension of fire :

Held that the defendant was entitled to protect his master's property, that for that purpose he was entitled to adopt all means which are necessary under the circumstances, and that his act was not a tort.

In re Joseph Crosfield & Sons, Limited.

In re California Fig Syrup Company.

In re H. N. Brock & Co., Limited.

[1910] 1 Ch. 118 and [1910] 1 Ch. 130 (C.A.)

Trade-mark—Registration—Laudatory epithet—Geographical name—Mis-spelt word—Trade-Marks Act, 1905 (5 *Edw. VII*, *C*. 15) *S*. 9, *Sub-S*. 5.

In this case, the following principles were laid down as governing the registration of trade-marks under S. 9, Sub-Section 5, of the Trade-Marks Act which runs as follows: "A registrable trade-mark must contain or consist of * * (5) any other distinctive mark", *distinctive* being defined as "adapted to distinguish the goods of the proprietor of the trade-mark from those of other persons"—(i) Such words as "good," "best", "superfine" are incapable of being distinctive or adapted as they cannot have a secondary meaning indicating only the goods of the applicant and therefore cannot be registered. (ii) An ordinary laudatory epithet, *e. g.*, ' perfection ' ought to be open to all the world and is incapable of registration though the applicant might, within a particular area, succeed in a passing-off action against a trader who used the epithet without sufficiently distinguishing his own goods from the goods of the applicant. However, if once registered, it cannot be removed after 7 years. (iii) Geographical words, or combinations into which, by reason of long usage in connection with particular goods, geographical words enter such as "California Syurp of Figs," might become distinctive, and may be registered. (iv) A word not being an invented word, ought not to be put on the register if the spelling is phonetic and sounds like a word which in its proper spelling could not be put on the register. On this ground, the word " Orlivosla" was declared incapable of registration.

In re **Mirlees' Charity** [1910] 1 Ch. 163.

Scheme for charity settled by Court—Construction—In the absence of specific words to the contrary, charities confined to charities within Court's jurisdiction.

A scheme for the administration of charity settled by the Eglish Court of Chancery sanctioning the application of the funds to a particular hospital in England or any other charity which the trustees may in their uncontrolled discretion determine, does not authorise the application of the funds to a charity in Scotland. In the absence of specific words to the contrary the funds are to be applied for the benefit of charities within the jurisdiction of the Court of Chancery.

Lowery *v.* **Walker.** [1910] 1 K. B. 173 (C. A.)

Negligence—Savage animal—Knowledge—Liability of owner to trespassers.

A farmer's field was used by his neighbours and others (some of whom were his customers for milk) as a shortcut to a Railway station, practically without any objection on his part for such user. The plaintiff, while so crossing the field, was bitten by a horse of the farmer there put by him and known to him to be vicious. In an action for personal injuries:

Held by the Court of Appeal (*Buckley* L. J. dissenting) that the plaintiff could not recover.

"A person who habitually allows his land to be used without objection by persons who in law, no doubt, are trespassers owes them no duty not to place on the land which he so allows them to cross, an animal which he knows to be vicious and dangerous without warning them of the danger to which they are exposed."

Per *Buckley*, L. J.—Such people are not strictly trespassers though they had no *right* to be there. "I think that the owner of a field which to the owner's knowledge has been habitually used by the public as a short cut, whether they come there by express leave or not, owes them a duty not to expose them to danger by putting into the field an animal which he knows to be dangerous."

Yonge *v.* **Toynbee.** [1910] 1 K. B. 215 (C. A.)

Solicitor—Lunacy of client—No knowledge of—Solicitor continuing action—Personal liability of solicitor for costs of opponent.

A solicitor, whose authority to act on behalf of his client ceased without his knowledge by the lunacy of his client, continued to act on behalf of his client and thus induced the other side, who were equally ignorant, to conduct proceedings, incurring costs.

Held by the Court of Appeal (*Vaughan-Williams* doubting) that the solicitor so acting was personally responsible for the costs of the other side of the action which had become abortive as he impliedly represented to them, though unknowingly, that he had authority to act.

[Compare Ss. 201 and 208 of the Indian Contract Act.—ED.]

Slarenger & Sons *v.* Spalding & Brothers.
[1910] 1 Ch. 257.

Trade-marks—Innocent infringement—No right to compensation—Trade-marks register not notice.

In the case where the infringement of a trade mark takes place without knowledge of its existence there is no right to compensation. The only right that the proprietor of the trade mark has is a right to an injunction.

Trade-marks registers cannot, in the absence of any statutory declaration to that effect, be considered as notice to all the world of the existence of the trade-mark.

Warwick Tyre Company, Ld. *v.* New Motor and General Rubber Company Ld.
[1910] 1 Ch. 248.

Passing-off action—Essentials of—Right to sue notwithstanding partial transfer of right to manufacture.

In a passing-off action, the plaintiff is not bound to show that the articles which are put upon the market by the defendants are identical with the articles supplied by the plaintiff or that any damage was sustained by the plaintiff by the action of the defendants. All that the plaintiff is bound to prove is that the defendants are putting their goods upon the market in such a way as to lead to the suspicion that they are the goods of the plaintiff.

Though there is no universal property in a trade name in that if the plaintiff has a trade name in one trade he cannot stop anybody else using the same name for the sale of some article which has no connection with the article in respect of which the plaintiff has acquired a reputation to the name, he has special property in his trade name; any way " whether you call it

special property or whether you call it a right, a plaintiff has the right to ask the Court for an injunction where he establishes that a particular name has by reputation been applied to the goods which belong to him, if other persons use the name in such a way as to lead to the supposition that their goods are his goods."

In this case the plaintiffs, the Warwick Tyre Company, manufacturers of certain cycle and motor cycle tyres which were known in the market as Warwick Tyres, were held entitled to an injunction against the defendants who applied the name of "Warwick Motor Tyres" to the motor tyres which they had recently begun to manufacture on the ground that the use of the word "Warwick" in connection with motor tyres would lead to the belief that Motor Tyres were of the same make as the cycle and motor cycle tyres of the plaintiffs.

It was also held that the plaintiffs were not disentitled to sue though they had parted with the right to carry on their business to another firm upon certain terms and for a specified period.

In re **Rhodesia Goldfields, Ld.: Partridge** *v.* **Rhodesia Goldfields, Ld.** [1910] 1 Ch. 239.

[N. B. Leave to appeal was refused by *Swinfen Eady* J. and the Court of Appeal.]

Debenture-holder's action—Trustee debenture-holder owing debt to Company—Cannot recover his share till the debt is paid.

The rule is of general application that when an estate is being administered by the Court or where a fund is being distributed, a party cannot take anything out of the fund until he has made good what he owes to the fund, and it is immaterial whether the amount is actually ascertained or not.

It was accordingly held in this case that neither a debenture-holder nor his transferee was entitled to recover the amount due to him out of the amounts realised in a debenture-holder's action when he is also a trustee for the debenture-holder and for the Company for the assets till the debt due from him to the Company is ascertained and paid.

In re **Innes : Innes** *v.* **Innes.** [1910] 1 Ch. 188.

Imperfect gift—Appointment of donee as executor—Difference between present intention to give and intention to give in future.

In this case, *Neville* J. held that a declaration by a person that he thereby determines and declares that from and after a certain date, his daughter (who was acting as his housekeeper from previously) shall receive from his business a certain sum per week, in a letter which he handed over to his daughter, neither operated as a contract so as to make her a creditor of the father nor as a trust (there being no transfer of property) nor could it operate as a gift on the appointment of the daughter as an executor. The rule of English law by which an imperfect gift is perfected by the appointment of the donee as executor does not apply where there is no present intention to give but only a declaration of an intention to give in the future.

In re **Burley: Alexander** *v.* **Burley.** [1910] 1 Ch. 215.

Will—Precatory Trust—Discretion to legatee.

A testatrix, who gave by her will £ 2,300 as legacy to one *R*, subsequently, by a codicil, wished him to use £ 1,000 out of the legacy for the endowment in the legatee's name of a cot in a hospital, and to retain the balance for his own benefit, and finally, by another codicil, wished him to use the balance also for such charitable purposes as the legatee shall, in his absolute discretion, think fit. *Held*: a valid precatory trust had been created in favour of charity. The Court was inclined to come to this opinion from the fact that the testator left no choice to the legatee as to whether he should apply at all the legacy to charity, though as regards £ 1,300 he had a discretion as to the charities to which he would apply the amount.

In re **Conolly: Conolly** *v.* **Conolly.** [1910] 1 Ch. 219.

Will—Precatory Trust—Gift of absolute property with subsequent words cutting down the gift—Construction.

The effect of recent decisions with reference to precatory trusts is thus stated by *Joyce* J.:—"Where in a will words of gift are used, which by themselves are sufficient to give the legatee, devisee or donee the whole property in the subject-matter of the gift, then the interest of that devisee or legatee will not be cut down to a trust estate or life estate with a trust for disposal after the determination of the life by the mere expression of a desire such as 'I desire that the property be left by the donees to some charitable purposes' or to somebody else."

Shuttleworth *v.* Clews. [1910] 1 Ch. 176.

Vendor and purchaser—Forfeiture of deposit and power to re-sell in the event of the purchaser's default.

In this case, a vendor, exercising his option under a contract of sale of land to resell the land and charge the purchaser with any deficiency of price, in the event of non-compliance on the part of the purchaser with the conditions of sale, was held bound to give credit for the amount of deposit in his hands, though the contract also provided for a forfeiture of the deposit in the event of such non-compliance.

Cyclists Touring Club *v.* Hopkinson. [1910] 1 Ch. 179.

Company not for profit—Power to give pension or gratuity to retired servants.

The Memorandum of Association of a Club, which was registered as an Association not for profit under S. 23 of the Companies Clauses Consolidation Act, while prohibiting the distribution of any sum as bonus, dividend or otherwise by way of profit, expressly provided that nothing therein was to prevent the payment in good faith of remuneration to any officers or servants of the Club in return for any services actually rendered to the Club. *Held*: the payment to a retired servant of the Club by way of annuity or by way of pension or by way of gratuity is within the powers of the Club and the payment for services actually rendered are not limited to payments legally due under legal contracts. *Neville* J. cited the following observations of *Bowen* L. J. in *Hutton* v. *West Cork Railway Co.*[1] with reference to the right of a trading Company to make gratuitous payments as equally applicable to Associations not for profit, *viz.*, "The test is what is reasonably incidental to and within the reasonable scope of carrying on the business of the Company * * * They are not to keep their pockets buttoned up and defy the world unless they are liable in a way which could be enforced at law or in equity. Most businesses require liberal dealings."

Stubbs v. Slater. [1910] 1 Ch. 195.

Principal and Agent—Secret charges—Though reasonable in amount, bad.

Without exception the rule of the Court is that secret charges cannot be made by an Agent to his Principal, and it does not

1. (1883) 23 Ch. D. 654, 671.

matter in the least that those secret charges are less than what reasonably might have been made by the Agent.

In re Discoveries Financial Corporation, Limited : Lindlar's Case. [1910] 1 Ch. 207.

Transfer of shares—Transferor's liability for further calls—Director's negligence in registering—Equitable rights of the transferee—Liquidator's right to avail himself of.

There is nothing to prevent a shareholder from escaping liability in respect of further calls by making an out and out transfer to a man of straw. The situation is not altered by the fact that the directors who had discretion to refuse registration negligently registered the transfer, unless the registration was brought about by collusion between the transferor and the directors or by any misrepresentation on his part. A recital in the deed of transfer of a fictitious consideration is not such misrepresentation as would invalidate the registration.

The right between the liquidator and the members of the company and between past and present members are statutory rights which can neither be straitened nor enlarged by the decisions of the Courts, *e. g.*, a liquidator cannot claim to be subrogated to any equitable rights possessed by the transferee to set aside the transfer.

JOTTINGS AND CUTTINGS.

I.—*Rules for the payment of the expenses of complainants and witnesses attending criminal courts in the City of Madras.*—Under S. 544 of the Code of Criminal Procedure, the Governor in Council, with the previous sanction of the Governor-General in Council, is pleased to make the following revised rules for regulating the payment, on the part of Government, of the expenses of witnesses (including complainants) attending the criminal courts in the City of Madras:—

I. Subject to the provisions hereinafter contained, the expenses of witnesses will be paid on behalf of Government in the following classes of cases, *viz.*—

(*a*) Cases shown in the second schedule of the Code of Criminal Procedure as not bailable.

(*b*) Cases in which the prosecution is instituted or carried on under the orders or with the sanction of the Governor in Council or of any public servant acting as such.

(*c*) Where the witness in question has been compelled to attend by a process issued under S. 540 of the Code.

(*d*) Cases in which the Court certifies that the attendance of such witness was directly in furtherance of the interests of public justice.

2. (1) For the purposes of these rules, Europeans, Eurasians and Natives shall be divided into three classes, and the Magistrate before whom they are required to appear, or the Commissioner of Police, or, in the case of witnesses from the mufassal, the Magistrate of the district from which they come, shall fix the class with due regard to the station in life of each individual.

(2) For the purposes of this rule, the Magistrate of the district may delegate his powers to any Subordinate Magistrate.

3. The following are the maximum rates which may be awarded to the several classes of witnesses, and no expenses in excess of, or other than, those here provided for, shall be allowed.

Witness.	Class.	Subsistence allowance.	Carriage hire allowable for days of actual attendance.	Travelling expenses, if any, incurred.		
				By rail.	By road.	By sea or canal.
Europeans and Eurasians.	1st class.	5 Rs. per day.	3 Rs. per day.	1st class fare.	8 as. per mile.	Actual expense of passage.
	2nd "	3 " "	2 " "	2nd "	6 " "	
	3rd "	1½ " "	1 Re. "	3rd "	4 " "	
Natives ...	1st "	2 " "	2 Rs. "	1st "	6 " "	
	2nd "	1 Re. "	1 Re. "	2nd "	2 " "	
	3rd "	5 as. "	*Nil.*	3rd "	2 " per 10 miles.	

4. All disbursements under these rules shall be made by the Commissioner of Police, to whom witnesses coming from the mufassal should report themselves on arrival at Madras.

5. Witnesses resident in the Presidency town will be entitled only to such actual expenses as they may show to the satisfaction of the Commissioner of Police that they have been obliged to incur in obedience to the process or order of the courts.

6. Witnesses sent from the mufassal will be furnished with a certificate by the despatching Magistrate showing the class to which they belong, the date of their departure, and the correct

distances (if any) to be travelled by road; and unless such certificate is produced before the Commissioner of Police, that officer may disallow all or any of the expenses claimed.

7. Mufassal Magistrates may make reasonable advances to witnesses summoned by the High Court or Presidency Magistrates and requiring such advances to enable them to reach Madras, but shall in every such case note the same on the certificate referred to in Rule VI. The Commissioner of Police should also be advised of such advances, and he will refund the amount to the officer making the advance.

8. Whenever it is practicable for witnesses to travel by rail or steamer, they shall be allowed no more than the rates prescribed for those modes of conveyance.

9. Subsistence allowance may be paid for the days occupied in travelling to Madras as well as in the return journey. The subsistence allowance at Madras will cease as soon after the conclusion of the inquiry or trial as the means of quitting the town become available.

10. The expenses of witnesses will be paid on production of a certificate signed by the presiding Magistrate, or, in the case of the High Court, by the Clerk of the Crown setting forth the inquiry or trial in which their attendance was required and the days on which they attended.

11. It shall be competent to the court before which a witness appears to disallow payment of any expenses on behalf of Government, if for any cause such court thinks fit to do so.

12. The Commissioner of Police will disallow the whole or part of the expenses of any witness for the defence whose evidence may not seem to him to have been material, unless he is satisfied that such witness has been brought down to Madras against his will and that no compensation for his expenses has been paid or deposited by the defendant. This power does not extend to the case of a witness who has been examined and certified by the Court or Magistrate to have been material.

13. In applying the foregoing rules to public servants to whom the Civil Service Regulations are applicable the following additional rules shall be observed:—

(1) When a public servant appears in any case under rule 1 to give evidence in his official capacity, that is, evidence of facts within his knowledge as an official, no payment shall be made to him, but the court will give him a certificate setting

forth that he appeared to give evidence of what had come to his knowledge, or of matters with which he had to deal, in his official capacity, the dates on which he appeared and the period for which he was detained, so as to enable him to draw travelling allowance and batta under Article 1133 of the Civil Service Regulations.

(2) When a public servant appears in his official capacity as a witness in a case which does not come under rule 1 (*e.g.*, in a case in which S. 244 (3) or 257, Code of Criminal Procedure, is applied), or when a public servant appears to give evidence in any case as a private person, travelling allowance and batta may be paid to him in the ordinary manner, but the court shall send an advice of all such payments made to him to the head of the office in which he is employed. In this advice the amount paid as batta and the period during which the attendance of the witness in court was necessary shall be stated.

(3) When an official of the Court of Wards appears in his official capacity as a witness in a case connected with an estate under the superintendence of the Court of Wards, the Judge or Magistrate before whom the trial takes place will furnish such official with a certificate showing the days on which he attended to give evidence and the amount of batta and travelling allowance paid to him on that account.

14. Medical subordinates in Local Fund or Municipal employ (including Government servants lent to, and paid by, local bodies) when attending court to give evidence in their public capacity shall be paid the same rates of travelling allowance and batta as would be admissible to Government servants of similar grades under the Civil Service Regulations.

15. Subjects of the French Government who are in the official employ of that Government in the French Dependencies in India appearing as witnesses before criminal courts in Madras City may, if such claim be made, be paid their expenses at the rates to which they are entitled under the Regulations of their own Government in like case. Magistrates are required to refer any claim under this rule for scrutiny to the Collector of South Arcot who is the Special Political Agent for the French Dependencies in India.

16. Officials of the Government of Ceylon appearing as witnesses before courts in Madras City may, if such claim be made, be paid their expenses at the rates to which they are

entitled under the Regulations of their own Government in like case. The claim should be submitted through the head of the department to which the official belongs.

II. Rules for the payment of the expenses of complainants and witnesses attending mufassal criminal courts in the Madras Presidency.—Under S. 544 of the Code of Criminal Procedure, the Governor in Council, with the previous sanction of the Governor-General in Council, is pleased to make the following revised rules for regulating the payment, on the part of Government, of the expenses of witnesses (including complainants) attending criminal courts in the Madras Presidency other than those of the City of Madras :—

1. The criminal courts are authorised to pay, at the rates specified in Rule 4, the expenses of complainants and witnesses in cases in which the prosecution is instituted or carried on by, or under the orders, or with the sanction of the Government, or of any Judge, Magistrate, or other public officer, or when it shall appear to the Judge or Magistrate presiding over such court to be directly in furtherance of the interests of public justice ; also in cases entered in Column 5 of Schedule II appended to the Code of Criminal Procedure, as not bailable ; and in all cases in which the witnesses are compelled to attend by a Magistrate under the provisions of chapter XLVI of the Code.

2. (1) For the purpose of these rules, witnesses are divided into two classes, namely, of officials and non-officials. Official witnesses, that is to say, public servants to whom the Civil Service Regulations are applicable, summoned to give evidence as officials, are entitled to receive for their journeys to and from the court and for the days spent by them in attendance at the court to give evidence in cases coming under rule 1, travelling allowances at the rates prescribed by the Civil Service Regulations for the time being in force. The court shall not, however, make any payment to official witnesses in such cases, but shall grant them certificates setting forth that they appeared to give evidence of what had come to their knowledge, or of matters with which they had to deal, in their official capacity, the date on which they appeared and the period for which they were detained, so as to enable them to draw travelling allowance and batta under Article 1133 of the Civil Service Regulations.

(2) When a public servant appears in his official capacity as a witness in other cases [*e.g.*, in cases in which S. 244

(3) or 257, Code of Criminal Procedure, is applied], or when a public servant appears to give evidence in any case as a private person, travelling allowance and batta may be paid to him in the ordinary manner, but the court shall send an advice of all such payments made to him to the head of the office in which he is employed. In this advice the amount paid as batta and the period during which the attendance of the witness in court was necessary shall be stated.

(3) When an official of the Court of Wards appears in his official capacity as a witness in a case connected with an estate under the superintendence of the Court of Wards, the Judge or Magistrate before whom the trial takes place will furnish such official with a certificate showing the days on which he attended to give evidence and the amount of batta and travelling allowance paid to him on that account.

3. Medical subordinates in Local fund or Municipal employ (including Government servants lent to, and paid by, local bodies) when attending court to give evidence in their public capacity shall be paid the same rates of travelling allowance and batta as would be admissible to Government servants of similar grades under the Civil Service Regulations.

4. Non-official witnesses are entitled to travelling allowances under two different scales as shown below according as they are (1) Europeans or East Indians, or (2) Natives. Persons falling under either of these descriptions are, for the purposes of these rules, divided into three classes; and the Judge or Magistrate before whom they are required to appear either as complainants or as witnesses shall be careful to fix the class with due regard to the station in life which they occupy:—

—	Europeans and East Indians.		
	First class.	Second class.	Third class.
Travelling allowance—By rail...	First-class fare.	Second-class fare.	Third-class fare.
By road	As. 8 per mile.	As. 4 per mile.	As. 2 per mile.
By sea or canal	Actual expense of passage.		
Batta not to exceed	Rs. 3 *per diem.*	Re. 1 *per diem.*	As. 8 *per diem.*

—	Natives.		
	First class.	Second class.	Third class.
Travelling allowance—By rail...	First-class fare.	Second-class fare.	Third-class fare.
By road	As. 6 per mile.	As. 2 per mile.	3 pies per mile.
By sea or canal	Actual expense of passage.		
Batta not to exceed	Re. 1 *per diem.*	As. 8 *per diem.*	As. 4 *per diem.*

5. In cases within rule 1 the Commissioner of Police may make reasonable advances to witnesses resident in the City of Madras who are summoned by a criminal court in the mufassal and who require the advances to enable them to reach the court. The court issuing the summons, on being advised by the Commissioner of Police of the advances made, will refund the amount to him.

6. The distance for which mileage and the number of days for which batta should be allowed for the journey to and from the station at which the court is held and for attendance at court shall be determined by the Judge or Magistrate ordering the payment in each case.

7. All bills for travelling allowance and batta to complainants and witnesses attending before the courts of Magistrates of the second and third class shall be scrutinized by the Magistrate of the division in which such courts are situated before the charges included in them are finally passed.

8. Whenever a Magistrate dismisses a case as frivolous or vexatious under S. 250 of the Code of Criminal Procedure, no travelling allowance or batta shall be granted to the complainant in such case.

9. The criminal courts are authorized to pay the necessary and actual expenses of carriage to a witness travelling by road, in the case of persons whose sickness, age, position or habits of life render it impossible for them to walk, provided the expense incurred under this rule shall in no case exceed As. 8 a mile.

10. To natives and Europeans graded in the first class of non-officials, there may also be allowed the actual cost of carriage-hire to and from court on the days of attendance at court.

11. Subjects of the French Government who are in the official employ of that Government in the French Dependencies in India appearing as witnesses before criminal courts in the Madras Presidency may, if such claim be made, be paid their expenses at the rates to which they are entitled under the Regulations of their own Government in like cases. Magistrates are required to refer any doubtful claim for scrutiny to the Collector of South Arcot who is the Special Political Agent for the French Dependencies in India.

12. Officials of the Government of Ceylon appearing as witnesses before criminal courts in the Madras Presidency may, if such claim be made, be paid their expenses at the rates to which they are entitled under the Regulations of their own Government in like cases The claim should be submitted through the head of the department to which the official belongs.

JUDICIAL COMMITTEE RULES, 1908.

Interpretation.

1. (1). In these Rules, unless the context otherwise requires :—

"Appeal" means an Appeal to His Majesty in Council;

"Judgment" includes decree, order, sentence, or decision of any Court, Judge, or Judicial Officer ;

"Record" means the aggregate of papers relating to an Appeal (including the pleadings, proceedings, evidence and judgments) proper to be laid before His Majesty in Council on the hearing of the Appeal;

"Registrar" means the Registrar or other proper officer having the custody of the Records in the Court appealed from ;

"Abroad" means the country or place where the Court appealed from is situate ;

"Agent" means a person qualified by virtue of Her Late Majesty's Order in Council of the 6th March, 1896, to conduct proceedings, before His Majesty in Council on behalf of another ;

"Party" and all words descriptive of parties to proceedings before His Majesty in Council (such as "Petitioner" "Appellant," "Respondent") mean, in respect of all acts proper to be

done by an Agent, the Agent of the party in question where such party is represented by an Agent;

"Month" means calendar month;

Words in the singular shall include the plural, and words in the plural shall include the singular.

(2) Where by these Rules any step is required to be taken in England in connection with proceedings before His Majesty in Council, whether in the way of lodging a Petition or other document, entering an appearance, lodging security, or otherwise, such step shall be taken in the Registry of the Privy Council, Downing Street, London.

LEAVE TO APPEAL.

Leave to Appeal generally.

2. All Appeals shall be brought either in pursuance of leave obtained from the Court appealed from, or in the absence of such leave, in pursuance of special leave to appeal granted by His Majesty in Council upon a Petition in that behalf presented by the intending Appellant.

SPECIAL LEAVE TO APPEAL.

Form of Petition for special leave to appeal.

3. A Petition for special leave to appeal to His Majesty in Council shall state succinctly and fairly all such facts as it may be necessary to state in order to enable the Judicial Committee to advise His Majesty whether such leave ought to be granted. The Petition shall not travel into extraneous matter, and shall deal with the merits of the case only so far as is necessary for the purpose of explaining and supporting the particular grounds upon which special leave to appeal is sought.

Three copies of petition to be lodged together with Affidavit in support.

4. The Petitioner shall lodge at least three copies of his Petition for special leave to appeal together with Affidavit in support thereof prescribed by Rule 50 hereinafter contained.

Time for lodging petition.

5. A petition for special leave to appeal may be lodged at any time after the date of the Judgment sought to be appealed from,

but the Petitioner shall, in every case, lodge his petition with the least possible delay.

Security for costs and transmission of Record.

6. Where the Judicial Committee agree to advise His Majesty to grant special leave to appeal, they shall, in their Report, specify the amount of the security for costs (if any) to be lodged by the Petitioner, and the period (if any) within which such security is to be lodged and shall, unless the circumstances of a particular case render such a course unnecessary, provide for the transmission of the Record by the Registrar of the Court appealed from to the Registrar of the Privy Council and for such further matters as the justice of the case may require.

General provision.

7. Save as by the four last preceeding Rules otherwise provided, the provisions of Rules 47 to 50 and 52 to 59 (all inclusive) hereinafter contained shall apply *mutatis mutandis* to Petitions for special leave to appeal.

Petition for special leave to appeal *in forma pauperis*.

8. Rules 3-7 (both inclusive) shall apply *mutatis mutandis* to Petitions for leave to appeal *in forma pauperis*, but in addition to the Affidavit refered to in Rule 4 every such Petition shall be accompanied by an Affidavit from the Petitioner stating that he is not worth £25 in the world excepting his wearing apparel and his interest in the subject matter of the intended Appeal, and that he is unable to provide sureties and also by a certificate of Counsel that Petitioner has reasonable ground of appeal.

Exemption of pauper Appellant from lodging security and paying Office fees.

9. Where a Petitioner obtains leave to appeal *in forma pauperis* he shall not be required to lodge security for the costs of the Respondent or to pay any Council Office fees.

Exemption of unsuccessful Petitioner for leave to appeal *in forma pauperis* from payment of Office fees.

10. A Petitioner whose petition for leave to appeal *in forma pauperis* is dismissed may, notwithstanding dismissal, be excused from paying the Council Office fees usually chargeable to a Petitioner in respect of a petition for leave to appeal if His Majesty in Council, on the advice of the Judicial Committee, shall think fit so to order.

RECORD.

Record to be transmitted without delay.

11. As soon as an Appeal has been admitted, whether by an Order of the Court appealed from or by an Order of His Majesty in Council granting special leave to appeal, the Appellant shall without delay take all necessary steps to have the Record transmitted to the Registrar.

Printing of Record

12. The Records shall be printed in accordance with Rules I to IV of Schedule A hereto. It may be so printed either abroad or in England.

Number of copies to be transmitted, where record printed abroad.

13. Where the Record is printed abroad, the Registrar shall, at the expense of the Appellant, transmit, to the Registrar of the Privy Council 40 copies of such Record, one of which copies he shall certify to be correct by signing his name on, or initialling, every eighth page thereof and by affixing thereto the seal, if any, of the Court appealed from.

The Certified copy to be transmitted, where record to be in England.

14 Where the Record is to be printed in England, the Registrar shall, at the expense of the Appellant, transmit to the Registrar of the Privy Council one certified copy of such Record, together with an index of all the papers and exhibits in the case. No other certified copies of the Record shall be transmitted to the Agents in England by or on behalf of the parties to the Appeal.

Record printed partly abroad, partly in England.

15. Where a part of the record is printed abroad and part is to be printed in England, Rules 13 and 14 shall, as far as practicable, apply to such parts as are printed abroad and such as are to be printed in England respectively.

Reasons for judgments to be transmitted.

16. The reasons given by the judge, or any of the judges, for or against any Judgment pronounced in the course of proceedings out of which the Appeal arises, shall by such judge or judges be communicated in writing to the Registrar and shall by him be transmitted to the Registrar of the Privy Council at the same time when the Record is transmitted.

17. The Registrar, as well as the parties and the Agents, shall endeavour to exclude from the record all documents (more particularly such as are merely formal) that are not relevant to the subject matter of the Appeal, and, generally to reduce the bulk of the record as far as practicable, taking special care to avoid the duplication of documents and the unnecessary repetition of headings and other merely formal parts of documents omitted to be printed or copied shall be enumerated in a list to be placed after the index or at the end of the record.

Exclusion of unnecessary documents from Record.

18. Where in the course of the preparation of a record one party objects to the inclusion of a document on the ground that it is unnecessary or irrelevant, and the other party nevertheless insists upon its being included, the record, as finally printed (whether abroad or in England), shall, with a view to the subsequent adjustment of the costs of and incidental to such document, indicate, in the index of papers, or otherwise, the fact that, and the party by whom, the inclusion of the document was objected to.

Documents objected to be indicated.

19. As soon as the record is received in the Registry of the Privy Council, it shall be registered in the said Registry, with the date of arrival, the names of parties, the date of the judgment appealed from, and the description whether " printed " or " written." A Record or any part of the Record, not printed in accordance with Rules I to IV of Schedule A hereto, shall be treated as written. Appeals shall be numbered consecutively in each year in the order in which the records are received in the said Registry.

Registration numbering of Records.

20. The parties shall be entitled to inspect the record and to extract all necessary particulars therefrom for the purpose of entering an Appearance.

Inspection of Record by parties.

21. Where the record arrives in England either wholly written or partly written and partly printed, the Appellant shall, within a period of four months from the date of such arrival in the case of Appeals from Courts situate in any of the countries or places named in Schedule B hereto, and within a period of two months from the same date in the case of

Times within which a copy of written Record shall be bespoken.

Appeals from any other Courts, enter an Appearance and bespeak a type-written copy of the record, or of such parts thereof as it may be necessary to have copied, and shall engage to pay the cost of preparing such copy at the following rates per folio typed (exclusive of tabular matter)—1½*d.* per folio of English matter, 2*d.* per folio of Indian matter, and 3*d.* per folio of foreign matter.

Notice of Appearance by Appellant.

22. The Appellant shall forthwith, after entering his appearance give notice thereof to the Respondent, if the latter has entered an Appearance.

Preparation of copy of record for Printer.

23. As soon as the Appellant has obtained the type-written copy of the record be-spoken by him, he shall proceed, with due diligence, to arrange the documents in suitable order to check the index, to insert the marginal notes and check the same with the index, and, generally, to whatever may be required for the purpose of preparing the copy for the printer, and shall, if the Respondent has entered an appearance, submit the copy, as prepared for the Printer, to the Respondent for his approval. In the event of the parties being unable to agree as to any matter arising under this Rule, such matter shall be referred to the Registrar of the Privy Council, whose decision thereon shall be final.

Lodging copy of Record for printing.

24. As soon as the type-written copy of Record is ready for the Printer, the Appellant shall lodge it, with a request to the Registrar of the Privy Council to cause it to be printed by His Majesty's Printer or by any other printer on the same terms, and shall engage to pay at the price specified in Rule V of Schedule A hereto, the cost of printing 50 copies thereof or such other number as in the opinion of the said Registrar the circumstances of the case require.

Special Case.

25. Whenever it shall be found that the decision of a matter on appeal is likely to turn exclusively on a question of law, the parties with the sanction of the Registrar of the Privy Council, may submit such question of law to the Judicial Committee in a form of a Special Case, and print such parts only of the Record as may be necessary for the discussion of the same. Provided that nothing therein contained shall in any way prevent the Judicial Committee from

ordering the full discussion of the whole case, if they shall so think fit, and that, in order to promote such arrangements and simplification of the matter in dispute, the said Registrar may call the parties before him and having heard them, and examined the Record, may report to the Judicial Committee as to the nature of the proceedings.

Examination of proof of Record and striking off copies.

26. The Registrar of the Privy Council shall, as soon as the proof of prints of the Record are ready give notice to all parties who have entered an Appearance requesting them to attend at the Registry of the Privy Council at a time to be named in such notice in order to examine the said proof prints and compare the same with the certified Record and shall, for that purpose, furnish each of the said parties with one proof print. After the examination has been completed, the Appellant shall, without delay, lodge his proof print, duly corrected and (so far as necessary) approved by the Respondent, and the Registrar of the Privy Council shall thereupon cause the copies of the Record to be struck off from such proof print.

Number of Copies of Record for parties.

27. Each party who has entered an Appearance shall be entitled to receive, for his own use, six copies of the record.

How costs of Printing Record are to be borne.

28. Subject to any special direction from the Judicial Committee to the contrary, the costs of and incidental to the printing of the Record shall form part of the costs of the Appeal, but the costs of and incidental to the printing of any document objected to by one party, in accordance with Rule 18, shall, if such document is found on the taxation of costs to be unnecessary or irrelevant, be disallowed to, or borne by, the party insisting on including the same in the Record.

PETITION OF APPEAL.

29. The Appellant shall lodge his Petition of Appeal—

Times within which Petition shall be lodged.

(a) Where the Record arrives in England printed within a period of four months, from the date of such arrival in the case of Appeals from Courts situate in any of the countries or places named in Schedule B, hereto, and

within a period of two months from the same date in the case of Appeals from any other Courts ;

(*b*) Where the Record arrives in England written, within a period of one month from the date of the completion of the printing thereof: Provided that nothing in this Rule contained shall preclude an Appellant from lodging his Petition of Appeal prior to the arrival of the Record, if there are special reasons why it should be desirable for him to do so.

Form of Petition.

30. The Petition of Appeal shall be lodged in the form prescribed by Rule 47 hereinafter contained. It shall recite succinctly and, as far as possible, in chronological order, the principal steps in the proceedings leading up to the Appeal from the commencement thereof down to the admission of the Appeal, but shall not contain argumentative matter or travel into the merits of the case.

Service of Petition.

31. The Appellant shall, after lodging his Petition of Appeal, serve a copy thereof without delay on the Respondent, as soon as the latter has entered an Appearance, and shall endorse such copy with the date of the lodgment.

WITHDRAWAL OF APPEAL.

Withdrawal of Appeal before Petition of Appeal has been lodged.

32. Where an Appellant, who has not lodged his Petition of Appeal, desires to withdraw his Appeal, he shall give notice in writing to that effect to the Registrar of the Privy Council, and the said Registrar shall, with all convenient speed after the receipt of such notice, by letter notify the Registrar of the Court appealed from that the appeal has been withdrawn, and the said appeal shall thereupon stand dismissed as from the date of the said letter without further order.

Withdrawal of Appeal before Petition of Appeal has been lodged.

33. Where an Appellant, who has lodged his Petition of Appeal, desires to withdraw his appeal, he shall present a Petition to that effect to His Majesty in Council. On the hearing of any such Petition a Respondent who has entered an Appearance in the appeal shall, subject to any agreement between him and the Appellant to the contrary, be entitled to apply to the Judicial Committee for his costs, but where the Respondent has not entered an Appearance or having entered an Appearance, consents in writing to the

prayer of the Petition, the Petition may, if the Judicial Committee think fit, be disposed of in the same way *mutatis mutandis* as a consent Petition under the provisions of Rule 56 hereinafter contained.

NON-PROSECUTION OF APPEAL.

Dismissal of Appeal where Appellant takes no step in prosecution thereof.

34. Where an Appellant takes no step in prosecution of his Appeal within a period of four months from the date of the arrival of the Record in England in the case of an appeal from a Court situate in any of the countries or places named in Schedule B hereto, or within a period of two months from the same date in the case of an Appeal from any other Court, the Registrar of the Privy Council shall, with all convenient speed, by letter notify the Registrar of the Court Appealed from, that the Appeal has not been prosecuted, and the Appeal shall thereupon stand dismissed for nonprosecution as from the date of the said letter without further order.

Dismissal of Appeal for non-prosecution after Appellant's Appearance and before lodgment of Petition of Appeal.

35. Where an Appellant who has entered an Appearance—

(*a*) fails to bespeak a copy of a written Record, or of part of a written Record in accordance with, and within the periods prescribed by Rule 21 ; or

(*b*) having bespoken such copy within the periods prescribed by Rule 21, fails thereafter to proceed with due diligence to take all such further steps as may be necessary for the purpose of completing the printing of the said Record ; or

(*c*) fails to lodge his Petition of Appeal within the periods respectively prescribed by Rule 29 ;

The Registrar of the Privy Council shall call upon the Apellant to explain his default, and, if no explanation is offered, or if the explanation offered is, in the opinion of the said Registrar, insufficient, the said Registrar shall, with all convenient speed, by letter notify the Registrar of the Court appealed from, that the Appeal has not been effectually prosecuted and the Appeal shall thereupon stand dismissed for non-prosecution as from the date of the said letter without further Order, and a copy of the said letter shall be sent by the Registrar of the Privy Council to all tne parties who have entered an Appearance in the Appeal.

36. Where an Appellant, who has lodged his Petition of Appeal, fails thereafter to prosecute his Appeal with due diligence, the Registrar of the Privy Council shall call upon him to explain his default, and, if no explanation is offered, or if the explanation offered is, in the opinion of the said Registrar, insufficient, the said Registrar shall issue a Summons to the Appellant calling upon him to show cause before the Judicial Committee at a time to be named in the said Summons why the Appeal should not be dismissed for non-prosecution. Provided that no such Summons shall be issued by the said Registrar before the expiration of one year from the date of the arrival of the Record in England. If the Respondent has entered an Appearance in the Appeal, the Registrar of the Privy Council shall send him a copy of the said Summons, and the Respondent shall be entitled to be heard before the Judicial Committee in the matter of the said Summons at the time named and to ask for his costs and such other relief as he may be advised. The Judicial Committee may, after considering the matter of the said Summons, recommend to His Majesty the dismissal of the Appeal for non-prosecution, or give such other directions therein as the justice of the case may require.

Dismissal of Appeal for non-prosecution after lodgment of Petition of Appeal.

37. An Appellant whose Appeal has been dismissed for non-prosecution may present a Petition to His Majesty in Council praying that his Appeal may be restored.

Restoring an Appeal dismissed for non-prosecution.

38. The Respondent may enter an Appearance at any time between the arrival of the Record and the hearing of the Appeal, but if he unduly delays entering an Appearance he shall bear, or be disallowed, the costs occasioned by such delay, unless the Judicial Committee otherwise direct.

Time within which Respondent may appear.

39. The respondent shall forthwith after entering an Appearance give notice thereof to the Appellant, if the latter has entered an Appearance.

Notice of Appearance by Respondent.

40. Where there are two or more Respondents and only one or some of them enter an Appearance, the Appearance Form shall set out the name of the appearing Respondents.

Form of Appearance where all the Respondents do not appear.

41. Two or more Respondents may, at their own risk as to costs, enter separate Appearances in the same Appeal.

Seperate Appearances.

42. A Respondent who has not entered an Appearance shall not be entitled to receive any notices relating to the Appeal from the Privy Council, nor be allowed to lodge a Case in the Appeal.

Non-appearing Respondent not entitled to receive notices or lodge Case.

43. Where a Respondent fails to enter an Appearance in an Appeal, the following Rules shall, subject to any special orders of the Judicial Committee to the contrary apply:

Procedure on non-appearance of Respondent.

(*a*) If the non-appearing Respondent was a respondent at the time when the Appeal was admitted, whether by the order of the Court appealed from or by an Order of his Majesty in Council giving the Appellant special leave to appeal, and it appears from the terms of the said Order, or Order in Council, or otherwise from the Record, or from a Certificate of the Registrar of the Court Appealed from, that the said non-appearing Respondent has received notice, or was otherwise aware of the order of the Court appealed from admitting the Appeal, or of the Orders of His Majesty in Council giving the Appellant special leave to appeal, and has also received notice, or was otherwise aware, of the despatch of the Record to England, the Appeal may be set down *ex-parte* as against the said non-appearing Respondent at any time after the expiration of three months from the date of the lodging of the Petition of Appeal;

(*b*) If the non-appearing Respondent was made a Respondent by an Order of His Majesty in Council subsequently to admission of the Appeal, and it appears from the Record, or from a Supplementary Record or from a certificate of the Registrar of the Court Appealed from, that the said non-appearing Respondent has received notice, or was otherwise aware, of any intended application to bring him on the Record of Respondent, the Appeal may be set down *ex-parte* as against the said non-appearing Respondent at any time after the expiration of three months from the date on which he shall have been served with a copy of His Majesty's Order in Council bringing him on the Record as a Respondent.

Provided that where it is shown to the satisfaction of the Judicial Committee, by Affidavit or otherwise, either that an Appellant has made every reasonable endeavour to serve a non-appearing Respondent with the notices mentioned in clauses (*a*) and (*b*) respectively and has failed to effect such services, or that it is not the intention of the non-appearing Respondent to enter an Appearance to the Appeal, the Appeal may, without further order in that behalf and at the risk of the Appellant, be proceeded with *ex-parte* as against the said non-appearing Respondent.

Respondent defending Appeal *in forma pauperis.*

44. A Respondent who desires to defend an appeal *in forma pauperis* may present a Petition to the effect to His Majesty in Council, which Petition shall be accompanied by an Affidavit from the petitioner stating that he is not worth £25 in the world excepting his wearing apparel and his interest in the subject-matter of the Appeal.

PETITIONS GENERALLY.

Mode of addressing Petitions.

45. All Petitions for orders or directions as to matters of practice or procedure arising after the lodging of the petition of Appeal and not involving any change in the parties to an Appeal shall be addressed to the Judicial Committee. All other Petitions shall be addressed to His Majesty in Council, but a Petition which is properly addressed to His Majesty in Council may include as incidental to the relief thereby sought, a prayer for orders or directions as to matters of practice or procedure.

Orders on Petitions which need not be drawn up.

46. Where an Order made by the Judicial Committee does not embody any special terms or include any special directions, it shall not be necessary to draw up such Order, unless the Committee otherwise direct but a Note thereof shall be made by the Registrar of the Privy Council.

Form of Petition.

47. All petitions shall consist of paragraphs numbered consecutively and shall be written, typewritten, or lithographed, on brief paper with quarter margin and endorsed with the name of the Court appealed from, the short title and Privy Council number of the appeal to which the Petition relates or the short title of the petition (as the case

may be), and the name and address of the London Agent (if any) of the Petitioner, but need not be signed. Petitions for special leave to appeal may be printed and shall, in that case, be printed in the form known as demy quarto or other convenient form.

Caveat.

48. Where a Petition is expected to be lodged, or has been lodged, which does not relate to any pending Appeal of which the Record has been registered in the Registry of the Privy Council, any person claiming a right to appear before the Judicial Committee on the hearing of such petition may lodge a Caveat in the matter thereof, and shall thereupon be entitled to receive from the Registrar of the Privy Council notice of the lodging of the Petition, if at the time of the lodging of the Caveat such petition has not yet been lodged, and if and when the Petition has been lodged, to require the Petitioner to serve him with a copy of the Petition, and to furnish him, at his own expense, with copies of any papers lodged by the Petitioner in support of his Petition. The Caveator shall forthwith after lodging his Caveat give notice thereof to the Petitioner, if the Petition has been lodged

Service of Petition.

49. Where a Petition is lodged in the matter of any pending Appeal of which the Record has been registered in the Registry of the Privy Council, the Petitioner shall serve any party who has entered an appearance in the Appeal with a copy of such Petition, and the party so served shall thereupon be entitled to require the Petitioner to furnish him, at his own expense, with copies of any papers lodged by the Petitioner in support of his Petition.

Verifying Petition Affidavit.

50. A petition not relating to any Appeal of which the Record has been registered in the Registry of the Privy Council, and any other petition containing allegations of fact which cannot be verified by reference to the Registered Record or any certificate or duly authenticated statement of the Court appealed from, shall be supported by Affidavit. Where the Petitioner prosecutes his Petition in person, the said Affidavit shall be sworn by the Petitioner himself and shall state that to the best of the deponent's knowledge, information and belief, the allegations

contained in the Petition are true. Where the Petitioner is represented by an Agent, the said Affidavit shall be sworn by such Agent and shall, besides stating, that, to the best of the deponent's knowledge, information and belief, the allegations contained in the Petition are true, show how the deponent obtained his instructions and the information enabling him to present the Petition.

Petition for Order of Revivor or Substitution.

51. A Petition for an Order of Revivor or Substitution shall be accompanied by a certificate or duly authenticated statement from the Court appealed from showing who, in the opinion of the said Court, is the proper person to be substituted, or entered, on the Record in place of, or in addition to a party who has died or undergone a change of status.

Petition containing scandalous matter to be refused.

52. The Registrar of the Privy Council may refuse to receive a Petition on the ground that it contains scandalous matter, but the Petitioner may appeal, by way of motion from such refusal to the Judicial Committee.

Setting down Petition.

53. As soon as a Petition is ready for hearing, the Petitioner shall forthwith notify the Registrar of the Privy Council to that effect, and the Petition shall thereupon be deemed to be set down.

Times within which set down Petitions shall be heard.

54. On each day appointed by the Judicial Committee for the hearing of Petitions the Registrar of the Privy Council shall, unless the Committee otherwise direct put in the paper for hearing all such Petitions as have been set down. Provided that, in the absence of special circumstances of urgency to be shown to the satisfaction of the said Registrar, no Petition, if unopposed, shall be so put in the paper before the expiration of three clear days from the lodging thereof, or, if opposed, before the expiration of ten clear days from the lodging thereof unless, in the latter case, the Opponent consents to the Petition being put in the paper on an earlier day not being less than three clear days from the lodging thereof.

Notice to parties of day fixed for hearing Petition.

55. Subject to the provisions of the next following Rule, the Registrar of the Privy Council shall, as soon as the Judicial Committee have appointed a day for the hearing of the Petition, notify all parties concerned by Summons of the day so appointed.

Procedure where Petition is consented to or is formal.

56. Where the prayer of a Petition is consented to in writing by the opposite party, or where a Petition is of a formal and non-contentious character, the Judicial Committee may, if they think fit, make their Report to His Majesty on such Petition, or make their Order thereon, as the case may be, without requiring the attendance of the parties in the Council Chamber, and the Registrar of the Privy Council shall not in any such case issue the Summons provided for by the last preceding Rule, but shall with all convenient speed after the Committee have made their Report or Order notify the parties that the Report or Order has been made and of the date and nature of such Report or Order.

Withdrawal of Petition.

57. A Petitioner who desires to withdraw his Petition shall give notice in writing to that effect to the Registrar of the Privy Council. Where the Petition is opposed, the Opponent shall, subject to any agreement between the parties to the contrary, be entitled to apply to the Judicial Committee for his costs, but where the Petition is unopposed, or where, in the case of an opposed Petition, the parties have come to an agreement as to the costs of the Petition, the Petition, may, if the Judicial Committee think fit, be disposed of in the same way *mutatis mutandis* as a Consent Petition under the provisions of the last preceding Rule.

Procedure where hearing of Petition unduly delayed.

58. Where a Petitioner unduly delays bringing a Petition to a hearing, the Registrar of the Privy Council shall call upon him to explain the delay, and, if no explanation is offered, or if the explanation offered is, in the opinion of the said Registrar, insufficient, the said Registrar may treat the said Petition as set down and may, after duly notifying all parties interested by Summons of his intention to do so, put the Petition in the paper for hearing on the next following day appointed by the Judicial Committee for the hearing of Petitions for such directions as the Committee may think fit to give thereon.

Only one Counsel heard on a side in Petition.

59. At the hearing of a Petition not more than than one Counsel shall be admitted to be heard on a side.

CASE.

Lodging of Case.

60. No party to an Appeal shall be entitled to be heard by the Judicial Committee unless he has previously lodged his Case in the Appeal. Provided that where a Respondent is merely a stake-holder or trustee with no other interest in the Appeal, he may give the Registrar of the Privy Council notice in writing of his intention not to lodge any Case, while reserving his right to address the Judicial Committee on the question of costs.

Printing of Case.

61. The Case may be printed either abroad or in England, and shall, in either event, be printed in accordance with Rules I to IV of Schedule A hereto, every tenth line thereof being numbered in the margin, and shall be signed by at least one of the Counsel who attends at the hearing of the Appeal or by the party himself if he conducts his Appeal in person.

Number of prints to be lodged.

62 Each party shall lodge 40 prints of his Case.

Form of Case.

63. The Case shall consist of paragraphs numbered consecutively and shall state, as concisely as possible, the circumstances out of which the Appeal arises, the contentions to be urged by the party lodging the same, and the reasons of appeal. References by page and line to the relevant portions of the Record as printed shall, as far as practicable, be printed in the margin, and care shall be taken to avoid, as far as possible the reprinting in the case of long extracts from the Record. The taxing officer, in taxing the costs of the Appeal, shall, either of his own motion, or at the instance of the opposite party, inquire into any unnecessary prolixity in the Case, and shall disallow the costs occasioned thereby.

Separate cases by two or more Respondents.

64. Two or more Respondents may, at their own risk as to costs, lodge separate Cases in the same appeal.

Notice of lodgement of case.

65. Each party shall, after lodging his Case, forthwith give notice thereof to the other party.

66. Subject as hereinafter provided, the party who lodges his Case first may, at any time, after the expiration of three clear days from the day on which he has given the other party the notice prescribed by the last preceding Rule, serve such other party, if the latter has not in the meantime lodged his Case, with a "Case Notice" requiring him to lodge his Case, within one month from the date of the service of the said case notice and informing him that, in default of his so doing, the Appeal will be set down for hearing *ex parte* as against him, and if the other party fails to comply with the said Case Notice, the party who has lodged his Case may, at any time after the expiration of the time limited by the said Case Notice for the lodging of the Case, lodge an Affidavit of Service (which shall set out the terms of the said Case Notice), and the Appeal shall thereupon, if all other conditions of its being set down are satisfied, be set down *ex parte* as against the party, in default. Provided that no Case Notice shall be served until after the completion of the Printing of the Record and that it shall be open to the Taxing Officer, in adjusting the costs of the Appeal, to inquire generally into the circumstances in which the said Case Notice was served and, if satisfied that there was no reasonable necessity for the said Case Notice, to disallow the costs thereof to the party serving the same. Provided also that nothing in this Rule contained shall preclude the party in default from lodging his Case, at his own risk as regards, costs and otherwise, at any time up to the date of hearing.

Case Notice.

67. Subject to the provisions of Rule 43 and of the last preceding Rule Appeal shall be set down *ipso facto* as soon as the cases on both sides are lodged, and the parties shall thereupon exchange Cases by handing one another, either at the Offices of one of the Agents or in the Registry of the Privy Council ten copies of their respective Cases.

Setting down Appeal and exchanging Cases.

BINDING RECORDS, &c.

68. As soon as an Appeal is set down, the Appellant shall attend at the Registry of the Privy Council and obtain ten copies of the Record and Cases to be bound for the use of the Judicial Committee at the hearing. The copies shall be bound in cloth or in half

Mode of binding Records, &c, for use of Judicial Committee.

leather with paper sides, and six leaves of blank paper shall be inserted before the appellant's Case. The front cover shall bear a printed label stating the title and Privy Council number of the Appeal, the contents of the volume, and the names and addresses of the London Agents. The several documents, indicated by incuts, shall be arranged in the following order : (1) Appellant's Case ; (2) Respondent's Case ; (3) Record ; (4) Supplemental Record (if any) and the short title and Privy Council number of the Appeal shall also be shown on the back.

Time within which bound copies shall be lodged.

69. The Appellant shall lodge the bound copies not less than four clear days before the commencement of the Sittings during which the Appeal is to be heard.

HEARING.

Notice to parties of date of commencement of Sittings; entering Appeals for hearing.

70. As soon as the Judicial Committee have appointed a day for the commencement of the Sittings for the hearing of Appeals, the Registrar of the Privy Council shall, as far as in him lies, make known the day so appointed to the Agents of all parties concerned, and shall name a day on or before which Appeals must be set down if they are to be entered in the List of Business for such Sittings. All Appeals set down on or before the day named shall, subject to any directions from the Committee or to any agreement between the parties to the contrary, be entered in such List of Business and shall, subject to any direction from the Committee to the contrary, be heard in the order in which they are set down.

Notice to parties of day fixed for hearing Appeals.

71. The Registrar of the Privy Council shall, subject to the provisions of Rule 42, notify the parties to each Appeal by Summons, at the earliest possible date, of the day appointed by the Judicial Committee for the hearing of the Appeal, and the parties shall be in readiness to be heard on the day so appointed.

Only two Counsel heard on a side in Appeals.

72. At the hearing of an Appeal not more than two Counsel shall be admitted to be heard on a side.

Nautical Assessors.

73. In Admiralty appeals the Judicial Committee may, if they think fit, require the attendance of two Nautical Assessors.

JUDGMENT.

Notice to parties of day fixed for delivery of Judgment.

74. Where the Judicial Committee, after hearing an Appeal, decide to reserve their Judgment thereon, the Registrar of the Privy Council shall in due course notify the parties who attended the hearing of the Appeal by Summons of the day appointed by the Committee for the delivery of the Judgment.

COSTS.

Taxation of costs.

75. All Bills of Costs under the Orders of the Judicial Committee on Appeals, Petitions, and other matters, shall be referred to the Registrar of the Privy Council, or such other person as the Judicial Committee may appoint, for taxation, and all such taxations shall be regulated by the Schedule of fees set forth in Schedule C hereto.

What costs taxed in England.

76. The taxation of costs in England shall be limited to costs incurred in England.

Order to tax.

77. The Registrar of the Privy Council shall, with all convenient speed after the Judicial Committee have given their decision as to the costs of an Appeal, Petition, or other matter, issue to the party to whom costs have been awarded an Order to tax and a Notice specifying the day and hour appointed by him for taxation. The party receiving such order to tax and Notice shall, not less than 48 hours before the time appointed for taxation, lodge his Bill of Costs (together with all necessary vouchers for disbursements), and serve the opposite party with a copy of his Bill of Costs and of the Order to tax and Notice.

Power of Taxing Officer where taxation delayed through the fault of the party whose costs are to be taxed.

78. The Taxing Officer, may, if he think fit, disallow to any party who fails to lodge his Bill of Costs (together with all necessary vouchers for disbursements) within the time prescribed by the last preceding Rule, or who in any way delays or impedes a taxation, the charges to which such party would otherwise be entitled for drawing his Bill of Costs and attending the taxation.

Appeal from decision of Taxing Officer.

79. Any party aggrieved by a taxation may appeal from the decision of the Taxing Officer to the Judicial Committee. The Appeal shall be heard by way of motion, and the party appealing shall give three clear days' Notice of Motion to the opposite

party, and shall also leave a copy of such Notice in the Registry of the Privy Council.

Amount of taxed costs to be inserted in his Majesty's Order in Council.

80. The amount allowed by the Taxing Officer to the Judicial Committee and subject to any appeal from his taxation to the Judicial Committee and subject to any direction from the Committee to the contrary, be inserted in His Majesty's Order in Council determining the Appeal or Petition.

Taxation on the pauper scale.

81. Where the Judicial Committee directs costs to be taxed on the pauper scale, the Taxing Officer shall not allow any fees of Counsel, and shall only award to the Agents out of pocket expenses and a reasonable allowance to cover office expenses, such allowance to be taken at about three-eighths of the usual professional charges in ordinary Appeals.

Security to be dealt with as HisMajesty's Order in Council determining Appeal directs.

82. Where the Appellant has lodged security for the Respondent's costs of an Appeal in the Registry of the Privy Council, the Registrar of the Privy Council shall deal with such security in accordance with the directions contained in His Majesty's order in Council determining the Appeal.

MISCELLANEOUS.

Power of Judicial Committee to excuse from compliance with Rules.

83. The Judicial Committee may, for sufficient cause shown, excuse the parties from compliance with any of the requirements of these Rules, and may give such directions in matters of practice and procedure as they shall consider just and expedient. Applications to be excused from compliance with the requirements of any of these Rules shall be addressed in the first instance to the Registrar of the Privy Council who shall take the instructions of the Committee thereon and communicate the same to the parties. If, in the opinion of the said Registrar, it is desirable that the application should be dealt with by the Committee in open Court, he may, and if he receives a written request in that behalf from any of the parties, he shall, put the application in the paper for hearing before the Committee at such time as the Committee may appoint, and shall give all parties interested Notice of the time so appointed.

Amendment of documents.

84. Any document lodged in connection with an Appeal Petition, or other matter pending before His Majesty in Council or the Judicial Committee may be amended by leave of the Registrar of the Privy Council but if the said Registrar is of opinion that an application for leave to amend should be dealt with by the Committee in open Court, he may and if he receives a written request in that behalf from any of the parties, he shall put such application in the paper for hearing before the Committee at such time as the Committee may appoint, shall give all parties interested Notice of the time so appointed.

Affidavits may be sworn before the Registrar of the Privy Council.

85. Affidavits relating to any Appeal, Petition, or other matter pending before His Majesty in Council or the Judicial Committee may be sworn before the Registrar of the Privy Council.

Change of Agent.

86. Where a party to an Appeal, Petition, or other matter pending before His Majesty in Council changes his Agent, such party, or the new Agent, shall forthwith give the Registrar of the Privy Council notice in writing of the change.

Scope of application of Rules.

87. Subject to the provisions of any Statute or of any Statutory Rule or Order to the contrary, these Rules shall apply to all matters falling within the Appellate Jurisdiction of His Majesty in Council.

Mode of citation and date of operation.

88. These Rules may be cited as the Judicial Committee Rules, 1908, and they shall come into operation on the 1st day of January 1909.

SCHEDULE A.

Rules as to Printing.

I. All Records and other proceedings in Appeals or other matter pending before His Majesty in Council or the Judicial Committee which are required by the above Rules to be printed shall henceforth be printed in the form known as Demy (*i. e.*,) 54 ems in length and 42 in width.

II. The size of the paper used shall be such that the sheet, when folded and trimmed, will be 11 inches in height and 8½ inches in width.

III. The type to be used in the text shall be Pica type, but Long Primer shall be used in printing accounts, tabular matter and notes.

IV. The number of lines in each page of Pica type, shall be 47 or thereabouts, and every tenth line shall be numbered in the margin.

V. The price in England for the printing by His Majesty's printer of 50 copies in the form prescribed by these Rules shall be 38*s*. per sheet (eight pages) of pica with marginal notes, not including corrections, tabular matter, and other extras.

SCHEDULE B.

Countries and Places referred to in Rules 21, 29 *and* 34.

Australia (and the constituent States thereof):
Basutoland.
British East Africa.
British Honduras.
British North Borneo.
Brunei.
Ceylon.
China.
Eastern African Protectorates.
Falkland Islands.
Federated Malay States.
Fiji.
Hong Kong.
India.
Mauritius
New Zealand.
Persia.
Seychelles.
Somaliland Protectorate.
Straits Settlements.
Zanzibar.

SCHEDULE C.

Fees allowed to Agents conducting Appeals or other matters before the Judicial Committee of the Privy Council.

	£.	s.	d.
Retaining Fee	0	13	4
Perusing written Record, at the rate of, for every 25 folios ...	0	6	8
Perusing Printed Record, at the rate of, for every printed sheet of 8 pages	1	1	0
Attendance at the Council Office, or elsewhere, on ordinary business, such as to enter an Appearance, to make a search, to lodge a Petition or Affidavit, or to retain Counsel	0	10	0
Attending at the Council Office to examine proof print of Record with the certified Record *per diem*	3	3	0
Attending at the Council Chamber on Summons for the hearing of a Petition	1	6	8
Attending at the Council Chamber all day on an Appeal not called on	2	6	8
Attending the Hearing of an Appeal .... *per diem*	3	6	8
Attending a Judgment	1	6	8
Correcting English proofs, at the rate of, for every printed sheet of 8 pages	0	10	6
Correcting Foreign or Indian proofs, at the rate of, for every printed sheet of 8 pages	1	1	0
Instructions for Petition	0	10	0
Drawing Petition, Case, or Affidavit ... ... *per folio*	0	2	0
Copying Petition, Case, or Affidavit ... ... *per folio*	0	0	0
Instructions for case	1	0	0

Instructions to Counsel to argue an Appeal		1	0	0
Instructions to Counsel to argue a Petition		0	10	0
Attending Consultation		1	0	0
Sessions Fee for each year or part of a year from the date of Appearance		3	3	0
Drawing Bill of Costs	*per folio*	0	1	0
Copying Bill of Costs	*per folio*	0	0	6
Attending Taxation of Costs of an Appeal		2	2	0
Attending Taxation of Costs of a Petition		1	1	0

II

COUNCIL OFFICE FEES.

Entering Appearance	0	10	0
Lodging Petition of Appeal	2	0	0
Lodging any other Petition	1	0	0
Lodging Case	1	0	0
Setting down Appeal (chargeable to Appellant only)	2	0	0
Setting down Petition (chargeable to Petitioner only)	1	0	0
Summons	0	10	0
Committee Report	1	10	0
Original Order of Majesty in Council determining an Appeal ...	4	0	0
Any other Original Order of His Majesty in Council... ...	2	0	0
Plain Copy of an Order of His Majesty in Council	0	5	0
Original Order of the Judicial Committee...	1	10	0
Plain Copy of Committee Order	0	5	0
Lodging Affidavit	0	10	0
Certificate delivered to Parties	0	10	0
Committee References	2	0	0
Lodging Caveat	1	0	0
Subpœnas to Witnesses	0	10	0
Taxing Fee in Appeals	3	0	0
Taxing Fee in Petitions	2	0	0

21st December, 1908. A.W. Fitzroy.

AT THE COURT AT BUCKINGHAM PALACE.

Present:—*The King's Most Excellent Majesty, Archbishop of Canterbury, Lord Chamberlain, Lord President, Lord Fitz-Maurice.*

Whereas there was this day read at the Board a representation from the Judicial Committee of the Privy Council in the words following, *viz*:—

"The Lords of the Judicial Committee having taken into consideration the practice and procedure in accordance with which the general appellate jurisdiction of Your Majesty in Council is now exercised and being of opinion that the rules regulating the said practice and procedure ought to be consolidated and amended: Their Lordships do hereby agree umbly to recommend to Your Majesty that with a view to such

consolidation and amendment certain Orders of Her Late Majesty Queen Victoria in Council regulating the said practice and procedure, *viz*, the Orders in Council dated respectively the 11th day of August 1842, the 13th day of June, 1853, the 31st day of March 1855, the 24th day of March, 1871, and the 20th day of June, 1873; and also the Order of Your Majesty in Council, dated the 26th day of March, 1905, amending the said practice and procedure ought to be revoked and that the several Rules hereunto annexed ought to be substituted therefor."

His Majesty having taken the said representation into consideration was pleased by and with the advice of His Privy Council to approve thereof and to order as it is hereby ordered that the said Orders in Council in the said Representation mentioned be and the same are hereby revoked and that the Rules hereunto annexed be substituted therefor.

21st December,
1908.

***

The Law's Delays:—In England there is a hue and cry raised against the pendency of cases which are not even more than six months old. In the Madras High Court second appeals take not less than two years while first appeals take not less than three years and yet there are no chances of these appeals and second appeals being disposed of earlier. After a decade or so of complaint and accumulation of arrears we have been able to get at last one more judge to dispose of the accumulated arrears of all these years. Strictly speaking litigation which is begun in the Munsif's Court and which ends in the High Court takes not less than five years for being finally disposed of. It will probably take two years in the Munsiff's Court, not less than a year in the District Court, and not less than two years in the High Court. If the litigation is commenced in the District Court and ends in the High Court it will take not less than six years for disposal (unless there is an appeal to the Privy Council when a further period of not less than 3 years will have to be added.) An original litigation in the District Court takes not less than 3 years for being disposed of and with the appeal in the High Court the period comes to 6 years. Surely some steps have to be devised for curtailing the time taken in these various Courts. At any rate the High Court may do what

it can for cutting short the period of litigation. Considerable time is occupied in obtaining copies and this time, while it adds to the delay, is not generally taken into account. The time for appealing to the District Court is 30 days and to the High Court 90 days from the date of the delivery of the judgment appealed against, but the actual date of filing is much longer owing to the time taken in obtaining copies. It will be in very many cases useful to know the time occupied in granting copies of judgments and decrees. It will be useful also to know in how many cases judgments can be said to be ready in fact for the purpose of being copied although judgments may have been delivered and pronounced in open Court. We think there is a considerable number of cases in which judges, for mere statistical purposes, deliver judgments when, as a matter of fact, they are being pruned and shaped afterwards when application for copies are made. We hope we are not in any way overstating if we say that in most cases it takes not less than 4 months, if not more, in the lower Courts to obtain copies for appeal. If the High Court calls for a return showing the time occupied in granting copies after judgment is pronounced and application is made for copies, useful purpose will be served. Any expedient which will shorten the period of litigation will be welcome to litigants, and if more judges could not be appointed the High Court may take this matter in hand as this is within its power to do. While Royal Commissions and a whole host of Bar Associations' protests come into existence when arrears in the High Court, the Supreme Court of Justice in England, are said to have accumulated for only a period of 6 months it is sickening to feel the indifference displayed by the authorities in the accumulation of arrears for a period of 3 or more years. We are glad that after the advent of the new Judge, the arrears in the High Court are being gradually cleared.

* * *

The Art of Cross-Examination.—The art of cross-examination is necessarily founded on principles.

These principles are well understood by barristers who have attained any degree of poficiency in the art, and can best be explained as follows:—

To cross-examine is to test in a Court of law the evidence of an opposing witness,

This is done by means of questions, and in accordance with the following working rules: "Come to the point as soon as possible." "Do not argue with a witness." "Do not ask a question unless there is a good reason for it." "Except in cases where your position is so bad that nothing can injure it, and something may improve it, do not splash about, and do not ask a question without being fairly certain that the answer will be favourable to you." "If a witness is manifestly lying, leave him entirely alone." "Keep calm."

These rules represent the practice of good cross-examiners at the present time. But not every cross-examiner is good.

With some, especially solicitor-advocates, what is known as "being clever with a witness," "shouting," "being made and then reprimanding the witness for impertinence," are favourite methods of extracting the truth, but these methods are mostly practised in Metropolitan Police and County Courts although they are occasionally resorted to elsewhere.

There was once a barrister who in criminal cases invariably commenced his cross-examination by gazing anxiously at a witness and saying: "Have you called at any public house on your way here?" and on getting an answer "No" would apologize and glance at the jury meaningly. The same person would always ask a police witness whether he didn't like getting lodging and conduct money for attendance at the Court!—The suggestion being that the case had been "got up" and so on.

I once heard a solicitor in a London County Court cross-examine a witness thus:—

"What? You don't mean to tell me your adn't got the brass?"

"Mr.——" interfered the Judge, "really you should show more respect to the Court."

"Well, your honour, I mean money" (to witness).

"Ad you got it?"

"No."

"Oh; You say that, do you! Well it is a lie, then."

Another solicitor in a Police Court was cross-examining a witness, and has received a disconcerting answer. The Court laughed. Not so the solicitor. He shook his fist at the witness. "You wait," he shouted, "I'll *catch* you directly!"

On another occasion a barrister, who had only just emerged from the solicitor's ranks, said to me, "If your man does n't settle, tell him I shall ask him whether he does not eat his meals in the kitchen. I was articled to him and know all about him."

Another and most ludicrous instance of how not to do it, I heard once in an Assize Court.

A witness, John Jones, had been called He was sworn and asked to say what he knew about the affair.

"Nothing."

"Nothing! Have the goodness to pay attention, Sir, you remember being in the Red Cow Inn on the 10th of last month.?"

"No, I don't."

The counsel handed the witness the depositions.

"Is that your name?"

"Yes."

The Judge nodded to the barrister. "You may treat him as a hostile witness."

The barrister having been given permission, began: Mr John Jones, you deny everything you have previously sworn. Have you been in the company of prisoner's friends since you last gave evidence?"

"No"

"I see. What did you have to drink before coming here?"

"Nothing except tea."

"Tea—ahem! a queer sort of tea. How many glasses of tea did you have?"

"I had two cups."

"Two very large cups, eh?"

The witness turned to the Judge.

"My lord, why should I be insulted?"

The Judge intervened. "Of course not; nobody means to insult you, but—"

"My lord, I know nothing about this case. I am a juror in waiting."

Note that the barrister had not the sense to see there was probably some mistake, but immediately jumped to suggestions of bribery and drunkenness. It was not his fault. Sergeant Buzfuz did the same sort of thing, but the Buzfuz type is becoming extinct now and so much the better.

At the Old Bailey now-a-days no one who hears R. D. Muir, George Elliott, and Foster Boutton cross-examine, would realize that 20 years ago the term an "Old Bailey" barrister meant one in whom strength of voice and power of invective took the place of forensic ability.

But so it was. And now it is changed again so much the better.

Come we now to the High Court, as established in the Royal Courts of Justice, London, and we shall learn what cross-examination, really is.

But let me take a look backward.

Erskine, Ganow and Scarlett stand far back in the past as masters of the art; then come the days of Coleridge, Hawkins, Karslake, Ballantyne and Giffard; then those of Russell, Lockwood Henry Mathews, Forrest Fulton, and Bigham; then the era of Lawson Walton and those whom I have selected as types to be studied here.

A wide survey, indeed, and many of them are dead or forgotten by the reading public.

To my mind Charles Russell will ever stand out as a very great cross-examiner. The public know him mainly by his cross-examination of Pigott before the Parnell Commission, which was but a slight thing, and his defence of Mrs. Maybrick, which was one of his few mistakes; but to those who heard him almost daily in the Courts and watched his methods, he must ever remain one of the chiefest of all. Powerful in his personality, short and to the point, his power of extracting truth from the unwilling by deduction and suggestion was very great.

He, however, belongs to a past generation, and these few words of tribute must suffice.

Frank Lockwood was another good cross-examiner, but of the bluff, or stand-and-deliver sort. He also sometimes was hardly courteous. I remember on one occasion—the "Lucky Dog" case—his persistently addressing the plaintiff as "Here." This was merely annoying as in voice name and appearance Mr. Reichardt was German!

The present Mr. Justice Bigham was, when at the bar, an extremely good cross-examiner, incisive, very cool and dead on

the mark. I always reckoned him next to Charles Russell, and in a commercial case he was even better than the late Chief Justice.

Taking back a littie to Sergeant Ballantyne, the following is an example of a really effective piece of cross-examination.

In a case in which he was prosecuting for child-murder, evidence was given by witness that the child, alleged to have been poisoned by continuous dosing with laudanum, appeared happy and was never heard to cry.

Sergeant Ballantyne cross-examined. "You say the child was always quiet?" "Yes." "Quiet—quiet as the grave?."

He sat down.

Sir John Coleridge again was a good cross-examiner, although his handling of the Tichborne Case has been variously estimated. Everyone knows his "would you be surprised to learn?" with which he prefaced his chief questions to the claimant, and the answer, "no, nor anything else you could say" and it certainly seemed unwise to give an opening for such an answer. However, the result of that very lengthy cross-examination was disastrous to the claimant.

Sir Henry Hawkins, in speaking to me of cross-examination, praised but one barrister, and that one Charles Russell. He, however, seemed to think very highly of the powers of the late Attorney-General, Sir John Lawson Walton.

He said further: "I can't explain my success as a cross-examiner, and I can lay down no golden rule of practice. Certainly the art of cross-examination is not to examine crossly, and perhaps I may say that the art is not to cross-examine at all. It may savour of a contradiction in terms, but my meaning is that the cross-examiner should not put a question unless he has a sound reason for doing so. Sometimes my cross-examination has consisted of a look, sometimes a nod. I seldom in any case put many questions, and never splashed about—that is fatal."

Sir Henry himself was rated very highly by his contemporaries, and perhaps in his defence of Col. Baker was he seen at his best. His methods, however, would hardly subserve the requirements of the present day standard, admirable though they were in his time. Let me take an example of his cross-examination of Mr. Baigent in the Tichborne case, which will

shew in its fullest aspect the old style—of ridiculing and arguing with the witness. It may be remembered that in his conversation Sir Henry attempted to discredit Mr. Baigent's opinion that the claimant and Sir Roger were one and the same person.

Mr. Hawkins: Didn't it strike you as rather strange that he (the claimant) could not spell his own uncle's name correctly?

Mr. Baigent: No.

Mr. Hawkins: Just like Roger.

Mr. Baigent: Yes, just like Roger.

Mr. Hawkins: Well, but gentlemen don't always send bottles of vermouth to old ladies—(laughter). "I hope she is enjoying good health" (quoting from a letter of the claimant.)

Mr. Baigent: Just his way.

Mr. Hawkins: Just like Roger? (Laughter).

Mr. Baigent: Yes, just like Roger (Laughter).

Mr. Hawkins: You say this person (the claimant) asked Charles Grey what place was that?

Mr. Baigent: That is the story.

Mr. Hawkins: The lost heir comes back to his house and asks, "what place is this." (Laughter).

Mr. Baigent: Oh, I should have done the same.

Mr. Hawkins: If you had not known anything about it before, you probably would. (Laughter.)

Mr. Baigent: Oh! I often play that kind of prank myself.

Mr. Hawkins: You must be a very humorous fellow down at Winchester? (Laughter.)

Mr. Baigent: Oh, I have often talked to people not telling them who I am, and asked them questions of that sort.

Mr. Hawkins: I declare I shall ask you for that photograph you promised me the other day.
Pick me out a good one. (Laughter).

Mr. Baigent: You then repudiated it with scorn, and said, "I don't want your photograph."

Mr. Hawkins: Oh, I will take the photograph if you like.

Mr. Baigent: Well, here is the photograph.

Coming now to living masters of the art, I must preface a short explanation.

The barristers specially dealt with by me are not the only good cross-examiners living. For instance, in a heavy commercial case, Sir Robert Finlay has no superior, and in the ordinary work of the King's Bench Division, who is more satisfactory than W. O. Dankwerts K. C., or H. G. Shee, K. C., or Marshall Hall, K. C. ?

Even the Chancery Courts have their Ogden Lawrence, K. C., T. R. Hughes, K. C., and Gore Browne, K. C., while in the Parliamentary Committee rooms there is no more efficient cross-examiner than Vesey Knox, K. C.—*Canada Law Times.*

(*To be continued.*)

* * *

Legislation by Regulations.—Complaint has often been made of the tendency in recent legislation to invest Government administrative departments with judicial functions, but an even more questionable practice has arisen of leaving the important machinery for the working out of new laws to be settled and fixed by departmental regulations. Officialism has its own view of what is, or ought to be, the law; and if these views do not coincide with the plain wording or the meaning of the Act which the department is set to carry out, so much the worse for the Act or for the section of the public whose interests it may affect. In the case of *the Straffordshire Financial Company, Ltd.* v. *Valentine*, before the Court of Appeal last week, the defendant denied liability on his bill, which had been discounted by the plaintiffs, on the ground that they had not properly registered themselves as money-lenders at the place where the transaction was carried out, and that, by reason of the provision of the Money-Lenders Act, 1900, they were therefore precluded from suing for payment. The answer of the plaintiffs was that, on any view of the case they had complied with the regulations provided by the Commissioners of Inland Revenue for the Registration of money-lenders' places of business. In the course of the argument it transpired that these regulations recognised in terms the carrying on of business by an unregistered money lender for a whole month (either on a change of address or on the running out of the three years' term for which an original

registration is effective) although the Act expressly provides [sec. 2 sub-section 12 (*b*)] that a money-lender shall carry on business in his *registered* name.....and at his *registered* address or addresses and at no other address." Lord Justice Vaughan-Williams, who took occasion to say, by way of comment on some previous rather strained decision under the Act, that since of those decisions were decisions which would not have been arrived at if it had not been a money-lending Act preferred to have his judgment against the plaintiffs on the ground of their non-compliance with the regulations rather than on the broad question that these regulations giving a liberty to trade which was excluded by the statute, were *ultra vires*, but the other members of the court (Lord Justice Fletcher-Moulton and Lord Justice Farwell) were quite firm on the point, and were prepared to find against the plaintiffs on both grounds. No one, of course, is going to waste sympathy on the woes of money lenders under the Act, but it would seem rather a hardship if their compliance with regulations issued by the Commissioners rendered them liable to have their business transactions invalidated. On the other hand the public would certainly have a grievance if the protection intended to be given by the Act against non-registered money-lenders were superseded by departmental orders claiming to have equal force with the statute.—*Law Journal.*

CONTEMPORARY LEGAL LITERATURE.

An article in the *American Law Review* (January-February, 1910) entitled *Proximate Cause in the Law of Torts* discusses the applicability to Torts of the doctrine of *Hadley* v. *Baxendale*. The writer is of opinion that the rule which limits a person's liability *only* to the consequences which he could reasonably have foreseen is applicable only to the Law of Contracts, and that the true rule applicable to Torts is that of *Smith* v. *London &c. Ry. Co.*[1] The reasonable contemplation of *some* injury is the factor determining the existence or non-existence of liability for harm to another resulting from an act not *per se* unlawful under the maxim *sic utere tuo ut alienum non laedas*. But if you were bound to foresee that *some* injury will result, you

1. L. R. 6 C. P. 14.

shall answer for all which does actually and logically result. Referring to the conflict of the dicta on the point both in text books and in decisions the author observes that the foregoing view best reconciles them and is also in harmony with the Roman and Continental Jurisprudence.

In a series of articles in the current Volume of the *Harvard Law Review*, Mr. Beale discusses the several rules adopted in different systems in deciding 'What law governs the validity of a Contract.' Though in some vague way an international matter, the author reminds us that the rule is essentially one of *Municipal* law. After referring to the prevailing confusion in discussions on the subject, the writer traces the history of the different views obtaining from time to time in England and America. The earliest English authority on the point in which all the later views were foreshadowed is *Robinson* v. *Bland*[1]. The Judges indicated (i) the law of the forum, (ii) the law of the place of performance, (iii) the law intended by the parties, and (iv) the law of the place of performance as that presumably intended by the parties, as being successively the governing factor. Some of these have since been rejected in England; the law of the forum in *Quarrier* v. *Colston* [2]; the law of the place of the subject-matter of the contract in *Stapleton* v. *Conway*[3]; the presumption of intent to submit the contract to the law of the place of performance, in *P. & O. Steam Navigation Co.* v. *Shand* [4]. The principle of the 'law intended by the parties' has now been finally accepted in England. (See *In re Missouri S. S. Co.*[5] ; *Hamlyn* v. *Talisker Distillery*[6]; *Spurrier* v. *La Cloche*[7].) This doctrine adopted by *Manfield* C. J., from continental writers is, in the opinion of Mr. Beale, an anomaly in the English law. In America Chief Justice *Shaw* disapproved of it and laid down the rule that a contract is governed by the law of the place of contracting; but, even in America, 'the prevailing tendency,' it is said, 'is to regard the intention of the parties as controlling.'

In examining the English and American decisions, the author then points out that in applying the doctrine of the 'intended'

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1. (1760) 1 W. BL. 234, 256.
2. (1842) 1 Phillips 147.
3. (1750) 3 Atk. 726.
4. (1865) 3 Moo. P. C. N. S. 290
5. (1889) 42 Ch. D. 321.
6. (1894) A. C. 202.
7. (1902) A. C. 446.

law, certain presumptions are allowed, or at any rate 'certain circumstances are given weight.' Thus 'the law of the place of making is *prima facie* the law intended[1] or the law of the flag[2] or the law indicated by the form of the document[3] or the law of the place of performance[4]. And when a foreign Government is party to a contract, the law of such Government is applied.[5]

Mr. Beale, however is, both on grounds of theoretical soundness and of the balance of practical convenience, in favour of the rule that the validity of a contract should be decided with reference to the law of the place of *making*. The fundamental objection, according to him, to the doctrine of the 'law intended by the parties' is that 'it involves permission to the parties to do a legislative act.' 'To determine which of several systems of law shall govern a given transaction is an act of the law.' The imperfection of the rule is evident from the attempts that have been made to 'limit' the exercise of the parties' will. The parties must *bona fide* intend to adopt the particular law, and further, they cannot adopt something unconnected with the transaction: their choice is confined as between the law of the place of making and that of the place of performance, and occasionally, the law of the *situs* also. Among the *practical* objections to the theory, he points out the want of certainty; for in numerous cases nothing short of an actual decision by the Court can incontestably determine what law the parties intended their contract to be governed by. On the other hand, to allow the question of the validity of a contract to be governed by the law of the place of *performance* is 'to give that law exterritorial effect.' A fundamental doctrine of our law is that 'the laws of every state affect and bind directly all acts done within it' and 'if the law of the place where the parties act refuses legal validity to their acts, it is impossible to see on what principle some other law may nevertheless give their acts validity.' Further the application of this rule too is not free from uncertainty; for performance may often consist of a *series* of acts which have to be done in different places.

1. (1884) 12 Q.B.D. 589.
2. (1865) 6 B. and S. 100
3. (1883) 10 Q.B.D. 521
4. (1899) 2 Ch. 173; (1907) 1 K. B. 746.
5. (1869) L. R. 8 Eq. 198.

BOOK REVIEWS.

Digest of Customary Law: By SIR W. H. RATTIGAN, K. C. Seventh Edition: By H. A. B. RATTIGAN (one of the Judges of the Chief Court of the Punjab). Published by Messrs. Wildy and Sons, London.—The digest of the Civil Law of the Punjab gives in a succinct form the customary law applicable in that province. It is interesting to compare this customary law with the Hindu law as administered by the courts. According to Mr. Mayne the customary law of the Punjab is the strict Hindu law stripped of all the Brahminical element which predominates it in other parts of India. It is regrettable that no efforts were made in other parts of India to collect the customary law which prevailed in those parts. Since the publication of the last edition about eight years ago there have been various rulings in the courts. It reflects the highest credit on the present editor that he has been able, amidst his arduous official duties, to find time for the preparation of this edition. The cases up to the end of June 1909 have been embodied, and on the whole the present edition is a considerable improvement upon the old. We trust the book will be found useful not merely to the practitioners of the Punjab but also to others elsewhere.

MR. S. SRINIVASA AIYAR'S *Case-Noted Criminal Code*, Vol. I, Price Rs. 7: Published by Messrs. R. Venkateshwar & Co., Ananda Press, Madras.—Case-noted editions of Acts are very valuable to the busy practitioner. The sections are not lost in the commentary and the practitioner knows where to find his law on any given point. In this Case-Noted Criminal Code Mr. Srinivasa Aiyar has given the cases under many appropriate headings catching to the eye. The present volume contains the two chief Acts relating to Criminal Law and Procedure, *viz.*, the Penal Code and the Criminal Procedure Code. It also contains the Evidence Act. We are sure the book will be found useful to the profession and trust it will meet with the encouragement it deserves.

The Limitation Act: By SARAT CHANDAR GHOSE: Published by Messrs. R. Cambray & Co., Calcutta. Price Rs. 1-4-0. *Part I.*—The author has to be congratulated upon his being first in the field in bringing out a commentary on the New Limitation Act. The change from the old law is pointed out and the notes are concise. The author has made a judicious selection of the cases. The author has issued Part I containing the sections with commentaries, and the articles and the commentary on them will form Part II which is not yet issued. We trust the book will be found useful by the members of the profession.

The Law and Practice relating to Letters Patent for Inventions: By THOMAS TERREL, K. C. Fifth Edition: By COURTNEY TERREL, Barrister-at-Law: Sweet and Maxwell, Limited, London: Price 30 *s.*—The author has made considerable improvements in the recent legislation in England on the subject. The Patent, and Designs Act of 1907, Edward VII, Ch. 29, is fully dealt with. The author points out that a considerable portion of the book has been re-written. A comparison of the last edition with the present fully justifies this statement. There can be no doubt that the present edition is a considerable improvement on the last. We commend this edition to the notice of the profession.

The Annual Digest of Indian Cases of 1909: By Mr. S. SRINIVASA IYER, High Court Vakil. Published by Messrs. R. Venkateshwar & Co., Ananda Press, Madras. Price Rs. 3.

Mr. Srinivasa Aiyar's Annual Digests are well-known to the legal profession and there is scarcely any need for our introduction. He studies the growing needs of the time and makes an improvement in each year's Annual Digest. The Civil Procedure Code of 1908 has been in force for nearly 18 months and the decisions have reference to the sections of both the old Code as well as of the New Code. In his Digest he takes the new sections as the basis and gives the corresponding old sections within brackets wherever the decisions are under the old Code. For the convenience of the practitioner he has also given a comparative table of the old and new sections. This table will be found very useful.

Acknowledgments.

We beg to acknowledge receipt of the following publications :—

Allahabad Law Journal for	March, 1910,
Bombay Law Reporter	Do.
Burma Law Reporter	Do.
Calcutta Law Journal	Do.
Calcutta Weekly Notes	Do.
Canada Law Journal	Do.
Canada Law Times	Do.
Case and Comment	Do.
Central Law Journal	Do
Chicago Legal News	Do.
Criminal Law Journal	Do.
Green Bag	Do.
Harvard Law Review	Do.
Hindustan Review	Do.
Kathiawar Law Reports	Do.
Law Magazine and Review	Do.
Law Notes	Do.
Law Students' Helper	Do.
Law Students' Journal	Do
Michigan Law Review	Do.
Police Service Magazine	Do
Punjab Law Reporter	Do.
The Law Journal	Do.
The Lawyer	Do.